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LEADING CASES

ON THE

PUBLIC LAND LAWS

OF THE

UNITED STATES,

WITH NOTES AND REFERENCES.

BY J. VANCE LEWIS,

ATTORNEY AT LAW.

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PREFACE.

An attempt has been made to collect in this volume the cases upon the Public Land Laws of the United States, of the most practical importance to the Bench and Bar of, what I may be allowed to term, the Public Land States and Territories.

It is also hoped that the volume may be found of use to those having to do with the disposition of the Public Lands, either as executive officers, or as attorneys practicing before the Land Department.

As the laws relating to Private Land Claims and Mineral Lands have no application to the body or mass of the Public Lands, the decisions under them have not been given.

The arrangement of the decisions herein has been made, as far as practicable, according to their subject matter or the legal questions involved; and, as nearly all questions arising under the Public Land Laws may be taken to the Supreme Court of the United States, and by that Court finally passed upon, the most of the cases have been selected from the decisions of that Court.

WASHINGTON, *May* 1, 1879.

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TABLE OF CASES REPORTED.

	PAGE
Atherton v. Fowler; cited 640	1
Bagnell v. Broderick: cited 312. 650. 663. 670. 727. 749. 767. 782	656
Baker v. Gee	350
Bates v. Railroad Co; cited 549	531
Beecher v. Wetherby	482
Bell v. Hearne; cited 607. 741. 743	594
Best v. Polk	307
Blanc v. LaFayette	736
Boyce v. Danz	744
Brill v. Stiles	213
Bronson v. Kukuk	703
Brush v. Ware	550
Calder v. Keegan	708
Chotard v. Pope; cited 71	62
Cofield v. McClelland	269
Cooper v. Roberts; cited 489	459
Crews v. Burcham; cited 332	579
Davenport v. Lamb; cited 267. 269	249
David v. Rickabaugh	739
Doe v. Wilson; cited 332. 580	576
Donovan v. Kloke	710
Easton v. Salisbury; cited 94. 327	55
Eldred v. Sexton	65
Fenn v. Holme; cited 664. 768	664
Ferguson v. McLaughlin	95
Foley v. Harrison; cited 163	502
French v. Fyan; cited 449	442
French v. Spencer; cited 576. 581	569
Fuller v. Hunt	232
Garland v. Wynn; cited 19. 114. 133. 153. 245. 749	171
Gazzam v. Phillips	24
Gibson v. Chouteau; cited 387. 710	758
Gilbert v. Thompson	582
Ham v. State of Missouri	451
Harkness v. Underhill	130
Heydenfeldt v. Mining Co.	476
Hogan v. Page	755

PAGE
Hooper v. Scheimer 663
Huff v. Doyle 496
Hughes v. United States; cited 334, 638 . . . 174
Hutchings v. Low; cited 6, 167, 382, 647 73
Jarvis v. Hoffman 237
Johnson v. Towsley: cited 4, 71, 139, 209, 444, 639, 749,767 142
Jones v. Soulard 529
Kelley v. Wallace 200
Kirkaldie v. Larrabee 230
Ladiga v. Roland; cited 327 275
Lamb v. Davenport 261
Larriviere v. Madegan 332
Leavenworth, etc., R. R. Co. v. U. S.; cited 384 . . 388
Le Roy v. Clayton; cited 634 598
Le Roy v. Jamison 608
Levi v. Thompson 725
Lindsay v. Hawes; cited 153, 245, 246, 475, 549, 749, 767 15
Litchfield v. Johnson 750
Litchfield v. The Register and Receiver; cited 446 . 722
Lytle v. The State of Arkansas; cited 73, 113, 173, 647, 684, 749 97
Lytle v. The State of Arkansas; cited 19, 133, 153, 749 . 112
McGarrahan v. Mining Co. 586
Marks v. Dickson 566
Martin v. Marks 447
Maxwell v. Moore 574
Meader v. Norton 769
Merrill v. Hartwell 564
Miller v. Dale 783
Miller v. Ellis 632
Minter v. Crommelin; cited 54, 684 648
Missouri, etc., R. R. Co. v. U. S. 413
Moore v. Robbins 634
Morton v. Nebraska 42
Myers v. Croft; cited 267 124
Newhall v. Sanger; cited 501 383
Oaks v. Heaton; cited 235 224
O'Brien v. Perry; cited 475, 565 679
Parker v. Duff 320
Pollard v. Hagan 508
Railroad Co. v. Fremont County; cited 437 . . . 430

PAGE
Railroad Co. v. Schurmeir 535
Railroad Co. v. Smith; cited 395, 446, 449 435
Railroad Land Co. v. Courtwright 373
Railway Co. v. McShane; cited 647 685
Reichart v. Felps; cited 54, 94, 311, 327 . . . 651
Rice v. Railroad Company: cited 370, 395, 396 . . . 335
River Bridge Co. v. Railroad Co. 378
Root v. Shields 183
Ross v. Barland; cited 40, 573, 662 671
Samson v. Smiley 158
Schulenberg v. Harriman: cited 395, 480 . . . 354
Semple v. Hagar 715
Seymour v. Sanders 219
Shepley v. Cowan; cited 640, 647 159
Sherman v. Buick; cited 96, 495, 501 87
Silver v. Ladd, cited 154, 199 241
Sioux City, etc., Railroad Co. v. U. P. Railroad Co. . 424
Smith v. Stevens 291
Springfield Township v. Quick 467
Stalnaker v. Morrison; cited 212 206
Stark v. Baldwin 209
State of Minnesota v. Bachelder: cited 154, 245 . . 469
Tate v. Carney; cited 565 178
Turner v. American Baptist Missionary Union; cited 328 315
Union Pacific Railroad Co. v. Watts 422
United States v. McEntee 217
United States v. Railroad Co.; cited 429 . . . 414
Van Reynegan v. Bolton 58
Verden v. Coleman 715
Verden v. Coleman 718
Walker v. Henshaw 298
Warren v. Van Brunt 133
Water and Mining Co. v. Bugbey 493
Wilcox v. Jackson; cited 222, 334, 399, 727, 741, 749, 768 . 29
Wilson v. Byers 728
Wilson v. Wall; cited 332 284
Wirth v. Branson 644
Wright v. Taylor 561
Wynn v. Morris 720
Yosemite Valley Case; cited 6, 167, 382, 647 . . . 73

TABLE OF CASES CITED.

PAGE

Adams v. Burke 269
Adams County v. B. & M. R. R. Co 442
Adsit v. Smith 563
Ainsworth v. Miller and Miller 142
Albee v. May 754
Aldrich v. Aldrich 217, 708
Alemany v. City of Petaluma 275
Almon v. Stevens 23
Almonester v. Kenton 598
American Emigrant Co. v. Wright County 449
Anderson v. Lewis 297
Armstrong v. Treasurer, &c. 598
Arnold v. Grimes 565, 742
Ashley v. Eberts 297
Athearn v. Poppe 495
Attridge v. Billings 11
Baird v. Wolf 664
Ballance v. Forsyth 334, 664
Ballon v. O'Brien 492
Barnard v. Ashley 19, 78, 114, 139, 151, 173
Barnes v. Murphy 274
Barry v. Gamble 767
Bates v. Herron 708
Baty v. Sale 209, 217
Beard v. Federy 782
Bell v. Duncan 561
Bell v. Parks 12
Bellinger v. White 703, 712
Bellows v. Todd 41
Benner v. Platter 550
Bennett v. Butterworth 669, 671
Benson v. Morrow 528
Bester v. Rankin 217
Billingsley v. Bates 23
Bird v. Dennison 19

PAGE
Bishop v. Marks 703
Blair v. Pathkiller 332, 579
Blair v. Worley 11
Blidworth v. Lake 508
Boardman v. Reed 664
Bodley v. Taylor 552
Bogart, *In re* 604
Boggs v. Merced Mining Co. 248, 260, 380
Bonds v. Hickman 314
Bonis v. James 12
Bonner v. Ware 561
Bonney v. McLeod 23
Boon v. Chiles 556
Boorman v. Sunnuchs 550
Boston v. Dodge 12
Bouldin v. Massie 554, 659
Bowers v. Meescher 130
Bowman v. Torr 12
Boyer v. Williams 14
Bracken v. Parkenson 171
Bradshaw v. Newman 11
Bradshaw v. Treat 10
Brake v. Ballou 141
Branch v. Mitchell 450
Branson v. Wirth 593
Braxen v. Bressler 550
Brewer v. Brewer 142
Brewster v. Madden 129
Brock v. Smith 9
Broussard v. Dugas 13
Brown v. Belmarde 296
Brown v. Clements 28, 104, 549
Brown v. Hunt 23
Bruggerman v. Hoerr 141
Bruner v. Manlove 215
Bryan v. Forsyth 768
Bryan v. Glass 12
Buckner v. Lawrence 94
Buena Vista County v. I. F. and S. C. R. R. Co. . . . 442
Bull v. Shaw 10

PAGE

Bullitt v. Taylor 627
Burdge v. Underwood 10
Burgess v. Gray 199
Burke v. Gaines 722
Burleson v. Teeple 12
Burns v. Hayden 14
Burrell v. Haw 170
Burton v. Williams 314
Bush v. Donohue 450
Bush v. Marshall 232, 574
Byers v. Neal 728
Cake v. Danks 23
Camp v. Smith 232
Campau v. Van Dyke 749
Campbell v. Clark 23
Campbell v. Wortman 447
Canal Trustees v. Havens 550
Carman v. Johnson 714
Carpenter v. Lewis 8
Carpenter v. Montgomery 664
Carpenter v. Williams 722
Carr v. Allison 12
Carroll v. Safford 702, 727
Carson v. Clark 11
Carson v. Smith 274
Castner v. Gunther 274
Castro v. Hendricks 622, 725
Cavender v. Smith 742
Central Pacific R. R. Co. v. Dyer 10, 372
Chamberlain v. St. Paul & S. C. R. R. Co. 372
Charles River Bridge v. The Warren Bridge . . 340, 395
Chase County v. Shipman 703
Cheney v. White 236
Cherokee Nation v. Georgia 396
Chiniquy v. Catholic Bishop 216
Chinn v. Darnett 314, 755
Chipley v. Farris 601, 634
Chouteau v. Eckhart 114
Christy v. Dana 129
Church v. Gilman 627

PAGE
City of Chicago v. Laflin 550
City of Mobile v. Emanuel 525
City of Mobile v. Eslava 525
City of Mobile v. Hallet 525
City of New Orleans v. Armas 722
Clark v. Akers 297
Clark v. Baker 129, 232
Clark v. Bayley 224
Clark v. Hall 314
Clark v. Libbey 297
Clark v. Schultz 13
Clark v. Smith 314, 408, 491
Clarke v. Fay 275
Clarkson v. Buchanan 447
Clements v. Warner 749
Climer v. Selby 171
Climer v. Wallace 23
Cocke and Jack v. McGinnis 572
Coleman v. Fish-ho-mah 311, 314
Collins v. Bartlett 11, 24, 651, 755
Colorado Company v. Commissioners 702
Com. v. The Erie and N. E. R. R. Co. 346
Comegys v. Vasse 19, 173
Comet v. Winton 578, 579
Comm'rs of Franklin Co. v. Pennock 702
Conger v. Weaver 10
Cook v. Foster 11
Copley v. Dinkgrave 171
Cornwell v. Culver 62
Courtney v. Perkins 170
Cousin v. Blanc 182
Cousin v. Labatut 722
Coy v. Coy 274
Coyell v. Cain 9
Crandall v. Woods 9
Crittenden v. Johnson 9
Crittenden v. Woodruff 9
Cruise v. Riddle 94
Cummins v. Scott 9
Cunningham v. Ashley 18, 114, 173, 684, 767

PAGE

Cunningham v. Browning 601
Cupps. v. Irvin 728
Curtis v. Hunting 744
Damrell v. Meyer 495
Danforth v. Morrical 170
Danforth v. Thomas 314
Danforth v. Wear 171, 314
Daniel v. Pervis 314, 447
Dart v. Hercules 447
Dawson v. Merille 229
Dean v. Wade 13
Denver City v. Kent 275
Dequindre v. Williams 298
Desmont v. Stone 14
Dewey v. Campau 313
Dewey v. Williams 371
Dillingham v. Brown 768
Dixon v. Caldwell 708
Doddridge v. Thompson 282
Dodge v. Perez 664
Doe v. Beebe 528
Doe v. City of Mobile 722
Doe v. Eslava 181, 722
Doe v. Wroot 666
Dolhequy v. Tabor 170
Doll v. Meader 606
Donner v. Palmer 601, 634
Doswell v. De La Lanza 607
Dovaston v. Payne 531
Downes v. Scott 722
Doyle v. Knapp 11
Dredge v. Forsyth 768
Dubuque and Pacific R. R. Co. v. Litchfield . 394, 395, 565
Duke v. Balme 708
Duncan v. Hall 8
Duncan v. Potts 8
Dunch v. Kent 560
Dunklin County v. District Court 469
Dunn v. Hearick 703
Dunn v. Schneider 205

PAGE

Dupas v. Wassell 8
Durfee v. Plaisted 651
Dutton v. Strong 549
Dyson v. Bradshaw 9
Easley v. Kellom 199
Edwards v. Tracy 275
Elliott v. Peirsol 33
Ellis v. Mosier 12
Ely v. Ellington 13
Emerson v. Sansome 10
Estrada v. Murphy 767
Evans v. Folsom 141
Everett v. Wells 405
Fackler v. Ford 192, 232
Falkner v. Jones 728
Falkner v. Leith 727
Farish v. Coon 528
Farnsworth v. Railroad Co. 372
Farrington v. Wilson 296, 702
Feirbaugh v. Materson 11
Fenwick v. Gill 205
Ferguson v. McCain 9
Fessler v. Haas 12
Field v. Seabury 199
Finch v. Riseley 372
Finley v. Williams 154
Fipps v. McGehee 284
Fischer v. Eslaman 216
Fisher v. Wisner 703
Fitzpatrick v. Dubois 205
Fletcher v. Peck 340, 408
Fletcher v. Pool 450
Floyd v. Ricks 9
Forbes v. Hall 171
Fore v. Williams 315
Forsyth v. Small 550
Fort v. Wilson 708
Foster v. Brost 130
Foster v. Neilson 327, 331, 332, 519
Franklin v. Palmer 216

PAGE
Frederick v. Gray 297
Fremont v United States 786
French v. Carr 11
Friedman v. Goodman 528
Frisbie v. Whitney . . 2, 6, 73. 167, 382. 386, 647. 749
Fulton v. McAffee 721
Gaines v. Nicholson 331, 464
Gaines v. Thompson 446, 723
Gale v. Davis 14
Galind v. Whittenmeyer 768
Galloway v. Finley 256, 575
Galt v. Galloway 256
Gardiner v. Miller 768
Garner v. Willett 643
Garrison v. Sampson 9
Garcia v. Lee 520
Gaston v. Stoll 447
Gavit v. Champers 550
Genesee Chief 548
Gibbons v. Dillingham 9
Gibbons v. Ogden 521
Gibson v. Chouteau 171, 766
Gibson v. Hutchings 13
Gile v. Hallack 224
Gillett v. Caffney 11
Gilman v. Philadelphia 194
Gilman v. Riopelle 205
Gilmer v. Poindexter 459, 664
Glasgow v. Hortiz 565
Gleason v. Edmunds 11
Godfrey v. Beardsley 296. 313, 608
Goodtitle v. Jones 666
Goodtitle v. Kibbe 528
Graham v. Roark 9
Graham v. United States 60
Grand Gulf R. R. and B. Co. v. Marshall 598
Granger v. Swart 534
Grant v. Smith 508
Gray v. McCance 170
Gray v. Stockton 200

PAGE

Greer v. Biddle 754
Green v. Liter 154, 601
Green v. Wood 405
Green v. Mezes 664
Grignon v. Astor 603
Griffin v. Cotton 12
Grifling v. Gibb 528
Grover v. Hawley 10
Guidry v. Woods 171
Guy v. Hermance 528
Gwynne v. Niswanger 703
Gygar's Estate 479
Haas v. Misner 702
Haffley v. Maier 232
Haight v. City of Keokuk 535
Hale v. Gaines 722
Hale v. Wilder 297
Hall v. Ashley 274
Hall v. Doran 274
Hall v. Dowling 702
Hall v. Russell 269
Hamilton v. Fowlkes 141
Hamilton v. Walters 12
Hanrick v. Barton 314
Harden v. Cullens 14
Harden v. Ho-yo-po-nubby 313
Harmon v. Partier 297
Harrington v. Saint Paul and S. C. R. R. Co. . . . 274
Harrington v. Sharp 129
Harris v. Barnett 314, 315, 332
Harris v. McKissack 296
Hastings v. Jackson 508
Hatfield v. Wallace 13
Hawkins v. Johnson 561
Heath v. Ross 766
Hedley v. Leonard 94
Hedrick v. Hughes 314
Hellon v. Sapp 13
Hemphill v. Davies 10
Henderson v. Poindexter 517

PAGE

Henderson v. State of Tennessee 719, 721
Henman v. Warner 528
Henry v. Welsh 170
Henshaw v. Bissell 574, 787
Herriot v. Broussard 13
Hess v. Bollinger 171
Hester v. Kembrough 171
Hestres v. Brennan 171
Hickey v. Starke 721
Hicks v. Butrick 291
Higgins v. Houghton 93, 492
Hildebrand v. Stewart 170
Hill v. Miller 170, 651
Hill v. Smith 12
Hine v. Trevor 548
Holden v. Andrews 10
Holden v. Joy 331
Holland v. Hensley 708
Holt v. Hemphill 94
Hoofnagle v. Anderson 553
Hooper v. Cummings 371
Hope v. Stone 232
Hosmer v. Wallace 170
Hot Springs Cases 58
Houston v. Walker 141
Hughes v. Sloan 9
Hulick v. Scovill 627
Hunnewell v. Cass County 702
Hunt v. Rousmanier's Adm'r. 569
Hunt v. Wickliffe 154
Hunter v. Hemphill 199
Huntingdon v. Grantland 728
Huntington v. Allen 744
Hutton v. Frisbie 8
Independence Town Co. v. DeLong 274
Insurance Co. v. Canter 331, 332
Iowa R. R. and Land Co. v. Adkins 736, 755
Irvin v. Rotramel 23
Irvine v. Irvine 574
Irvine v. Marshall 565, 741, 768

PAGE
Isaac v. Steel 215
Jackson v. Bard 766
Jackson v. Bodle 627
Jackson v. Dunlap 627
Jackson v. Hudson 491
Jackson v. Lawton 177, 248
Jackson v. Neely 559
Jackson v. Phelps 627
Jackson v. Spink 728
James v. Snelson 14
Jenkins v. Gibson 13, 94
Johns v. DeRome 298
Johnson v. Ballou 372
Johnson v. Gilfillan 708
Johnson v. Horne 94
Johnson v. Houghton 728
Johnson v. McIntosh 490, 578
Jones v. City of Petaluma 275
Jones v. Donahoo 12
Jones v. Kimble 23
Jones v. Pettibone 550
Jones v. Tainter 129
Jones v. Walker 297
Jones v. Whedis 13
Jones v. Yoakam 236
Jordan v. Updegraff 12
Judson v. Stephens 217
Kansas Indian Tax Cases 332, 702
Keeler v. Brickey 314, 447
Keeran v. Allen 447
Keeran v. Griffith 447
Keeton v. Andsley 14
Kellar v. Belleaudeau 714
Kelley v. Mack 10
Kennedy v. McCartney 298
Kenyon v. Quinn 129
Kerby v. Fogleman 170
Kerr v. Mack 200
Kerr v. Watts 200, 556
Key v. Jennings 708

PAGE

Kissell v. St. Louis Public Schools 529, 531
Kittridge v. Beard 171
Kizer v. Lock 142
Klein v. Argenbright 708, 742
Knight v. Elliot 23
Knox v. Pulliam 171
Kranse v. Means 755
Krant v. Crawford 550
Lamb v. Wakefield 269
Lammers v. Nissen 535
Lamont v. Stimson 171
Land v. Land 314
Landes v. Brant 573, 574
Lanfear v. Hunley 722
Langlois v. Coffin 314
Lapeyre v. United States 601
Lavergne v. Elkin 634
Lawrence v. Grout 447
LeBeau v. Armitage 685
Lechler v. Chapin 275
Lee v. Parker 199
Leech v. Ranch 274
Leroy v. Carroll 768
Lessieur v. Price 346, 369, 504, 722, 766
Lestrade v. Barth 767
Lewen v. Smith 23
Lewis v. Lewis 170
Lewis v. Love 297
Lick v. Dias 602
Lindersmith v. Schwiso 13
Lindsey v. Miller 768
Lindsey v. Sellers 13
Litchfield v. Hamilton 261
Littleton v. Cross 766
Long v. Culp 703
Long v. McDonald 297
Longworth v. Worthington 754
Lonsdale v. Portland City 8
Lorimer v. Lewis 12
Lott v. Proudhomme 601, 634

PAGE

Lowery v. Weaver 296
Lownsberry v. Rakestraw 297
Lyell v. Maynard 744
Lynch v. Bernal 766
McAfee v. Keirn 314
McArthur v. Browder 154
McArthur v. Phoebus 200
McCarthy v. Mann 574
McClaren v. Wicker 569
McClintock v. Bryden 10
McCluny v. Sillman 725
McCormick v. Huse 24
McCue v. Smith 141
McDaniel v. Orton 714
McDonald v. Edmonds 10
McDonald v, Gaylor 8
McDonald v. Smalley 256
McDowell v. Morgan 217
McElyea v. Hayter 563
McFarland v. Culbertson 14
McFarland v. Mathis 9
McGary v. Hastings 62
McGehee v. Wright 170
McGoon v. Scales 702
McIntire v. Wood 725
McIver v. Reagan 571
McLane v. Bovee 685
McMahon v. Welsh 703
McStay v. Friedman 722
McTaggart v. Harrison 275
Mack v. Brammer 561
Mackay v. Dillon 722
Maguire v. Tyler 598. 603, 722
Maguire v. Vice 768
Mahony v. Van Winkle 62, 205
Mankato v. Meagher 274
Marbury v. Madison 601
Marston v. Rowe 141
Martin v. Carlin 23
Martin v. Hunter 114

PAGE
Martin v. Nash 728, 744
Martin v. United States 782
Martin v. Waddell 520
Martz v. Williams 23
Matthews v. Rector 703
Matthews v. Zane 673, 722
May v. Baskin 23
May v. Symmes 142
Mayers v. Byrne 492
Maynes v. Veale 755
Maxfield v. Bierbauer 13
Mechanics Bank v. N. Y. etc., R. R. Co. 706
Megerle v. Ashe 495
Meigs v. McClung 332
Merrell v. Legrand 13
Mertins v. Joliffe 560
Miami County v. Breckenridge 703
Millander v. Lalande 170
Miller v. Davis 141
Miller v. Kerr 553
Miller v. Lelan 12
Miller v. Little 224
Mills v. Lockwood 735
Mills v. Saint Clair County 345
Mills v. Stoddard 314
Ming v. Truett 274
Mining Company v. Boggs 722
Minter v. Shirley 492, 651
Missouri, etc., R. R. Co. v. Kan. P. R. R. Co. 429
Mitchell v. Cobb 170
Mitchell v. Parker 199
Mitchell v. Ryan 602
Mitchell v. United States 332
Monette v. Cratt 335
Montgomery v. Whiting 10
Moore v. Bennett 560
Moore v. Besse. 129
Moore v. Fields 14
Moore v. Hill 655
Moore v. Hunter 561, 744

PAGE

Moore v. Jordan 129
Moore v. Maxwell 569
Moran v. Palmer 744
Morancy v. Ford 170
Moreland v. Page 722
Morgan v. Curtenius 129
Morgan v. Reading 550
Moriarty v. Boone County 703
Mortin v. Blankership 714
Morton v. Smith 563
Mumford v. McKinney 94
Mungosah v. Steinbrook 297
Neff v. Paddock 23
Nelson v. Sims 171
New Jersey v. Wilson 702
Newman v. Doe 311
New Orleans v. United States 311, 528
New York Indian Tax Cases 702
Nichols v. Nichols 563
Nicks v. Rector 171
Nicoll v. N. Y. and Erie R. R. Co. 371
Niles v. Anderson 297, 311
Nolan v. Gwyn 297
Nolen v. Parmer 23
Norman v. Ellis 13
Northern Railway Co. v. Gould 10
Nycum v. McAllister 229, 235
Ohio Life and Trust Co. v. DeBolt 345
Owings v. Norwood 719, 721
Pacific Railway Co. v. Lindell 459
Page v. Hobbs 8, 9
Page County v. B. and M. R. Railroad Co. 442
Parker v. Great W. Railway 346
Parker v. Winsor 702
Parkinson v. Bracken 643
Parsons v. Bedford 668
Patten v. Richmond 224
Patton v. McClure 572
Patterson v. Jenks 314
Patterson v. Tatum 643

PAGE

Patterson v. Winn 593, 608, 664, 782
Pawlet, Town of, v. Clark 339
Pearce v. Tranturn 13
Peck v. Miama County 702
Pelham v. Wilson 9
Penn v. Ott 129
Pennock v. Monroe 297
Pennybecker v. McDougal 11, 755
People v. Black Diamond C. and M. Co. 702
People v. Brown 371
People v. Cohen 702
People v. Gilbert 764
People v. Morrison 702
People v. Shearer 702
People v. State Treasurer 565
Pepper v. Dunlap 12
Perrine v. Chesapeake Canal Co. 345
Perry v. Ashby 240
Perry v. Superior City 275
Pettit v. Pettit 297
Phelps v. Kellogg 130, 232
Phillips v. Irwin 601
Phillips v. Moore 728
Phillips v. Sherman 598
Pickens v. Harper 291
Pico v. United States 60
Pierson v. David 130, 232
Pin v. Morris 14
Plume v. Steward 10
Polk v. Wendell . . . 54, 312, 327, 341, 552, 650, 659, 664
Pollard v. Files 522, 525
Pollard v. Kibbe 113, 522, 525
Presbury v. Morris 707
Preston v. Browder 314
Price v. Curran 13
Primot v. Thibodeaux 170
Quinn v. Kenyon 129, 205
Quinney v. Denney 296
Railroad Co. v. Tenis 372
Railway Co. v. Prescott 427, 699, 706

PAGE
Randall v. Edert 200
Randall v. Kreiger 563
Rankin v. Miller 714
Raser v. Quaills 11
Ratcliff v. Bridger 12
Rector v. Ashley 722
Reed v. Marsh 722
Reeder v. Barr 559
Reichart v. Felps 656
Reily v. Heish 62
Reynolds v. McArthur 282
Rex v. Barrell 405
Rex v. Poor Law Commrs' 405
Rhea v. Hughes 8
Rice v. Ruddiman 528
Rich v. Maples 9
Richards v. Emswiler 130
Richmond Railroad v. The Louisa R. R. Co. 345
Ridgway v. Ludlow 550
Robbins v. Bunn 217, 637
Roberts v. Cooper 467
Robertson v. Phillips 12
Robertson v. Wood 728
Robinson v. Campbell 667
Robinson v. Forrest 447
Roe v. Head 666
Rogers v. Brent 215, 728
Rondell v. Fay 314
Rose v. Buckland 563
Rose v. Treadway 141
Rush v. Casey 62
Russell v. Defrance 14
Russell v. Lowth 224
Rutherford v. Green 110, 162, 368
Rutledge v. Murphy 170
Ryan v. Brown 550
Ryan v. Thomas 722
Sacramento Savings Bank v. Haynes 170, 205
Saint Clair County v. Lovington 550
St. Peter County v. Bunker 141, 142

PAGE
Sands v. Adams County 703
Sankey v. Noyes 14
Sargent v. Kellogg 11
Sawyer v. Cox 23, 315
Schnee v. Schnee 561
Schurmeir v. St. P. and P. Railroad Co. 547
Scott v. Evans 561
Scuddy v. Shaffer 508
Seaton v. Sharkey 129
Secretary v. McGarrahan 446, 723
Seely v. Wells 314
Selby v. Cash 275
Sensenderfer v. Smith 736
Serrano v. United States 786
Seymour v. Watson 11
Shaffer v. Scuddy 722
Sharon v. Wooldrick 335
Shaw v. Boyd 8
Sherrer v. Bullock 9
Sherry v. Sampson 275
Sillyman v. King 728
Silver v. Ladd 722
Sims v. Lively 345
Singleton v. Pouchard 664
Sloan v. Moore 13
Smith v. Adsit 722
Smith v. Athern 643
Smith v. Johnson 130
Smith v. Mosier 573
Smith v. Pipe 275
Smith v. Shane 563
Smith v. Sheeley 127
Smith v. Troup 572
Snow v. Ferrea 130
Snow v. Flannery 141, 229
Society, etc., v. Pawlet 754
Soulard v. United States 53
Southard v. Central R. R. Co. 371
Sparrow v. Strong 267
Spaulding v. Martin 400

PAGE

Sperlin v. Millikin 13
Stark v. Barnes 9
Stark v. Starrs 152, 246, 647, 749, 767, 782
State v. Delesdenier 400
State v. Dent 459
State v. Jonssen 170
State v. Stringfellow 492
Stauffer v. Stephenson 315
Steamboat Magnolia v. Marshall 550
Stein v. Ashby 24
Stephens v. Mansfield 10
Stephens v. Westwood 643
Stephenson v. Goff 535
Stephenson v. Smith 171, 767
Stephenson v. Wilson 563
Stevens v. Hatch 602
Stewart v. Boyd 23
Stewart v. Chadwick 12
Stockton v. Williams 313, 329
Stoddard v. Chambers 57, 94, 311, 327, 574, 664
Stoddard v. Smith 561
Stone v. Young 12
Stourbridge v. Wheeley 346
Stout v. Hyatt 492
Stover v. Bounds 728
Stringer v. Young 94, 664
Strong v. Rachel 129
Strother v. Lucas 669
Stryker v. Polk County 261
Stubblefield v. Branson 13
Sullivant v. Weaver 261
Summer v. Spybuck 291
Supervisors of Whitesides County v. States Attorney . . 447
Surget v. Little 651
Sweatt v. Corcoran 651
Switzer v. Skiles 11
Tartar v. Hall 10, 232
Tartar v. Spring Creek Mining Co. 9
Tarvee v. Smith 297
Taylor v. Baker 11

PAGE
Taylor v. Brown 171
Taylor *v.* Mortin 331
Taylor v. Underhill 528
Terrett v. Taylor 339
The Cherokee Tobacco Case 331
The Clinton Bridge 331
The Jefferson 348
Theroit v. Chandoir 13
Thomas v. Wyatt 256, 750
Thompson v. Holton 703
Thompson v. Myrick 335
Thompson v. Prince 769
Thompson v. Thornton 447
Thompson v. True 492
Thredgill v. Pintard 128, 132, 232, 267
Thurston v. Alva 141
Tibbals v. Jacobs 602
Toland v. Mandell 500
Tomlin v. D. B. & M. R. R. Co. 535
Townsend v. Little 9
Towsley v. Johnson 209, 212
Treadway v. Sharon 14
Treadway v. Wilder 141, 275
Trimble v. Boothby 261
Tucker v. Ferguson 372, 702
Turley v. Tucker 14
Turney v. Fish 284
Turney v. Saunders 11
Tyler v. Maguire 722
Udell v. Davidson 722
U. M. & M. Co. v. Dangberry 219
U. M. & M. Co. v. Ferris 769
United States v. Arredondo 311, 659
United States v. Brooks 314, 332
United States v. Brown 219
United States v. Commissioner 725
United States v. Cook 397, 408, 491
United States v. Dixon 411
United States v. Gear 319
United States v. Gratiot 221

PAGE
United States v. Hoar 764
United States v. Hughes. 177, 334, 638
United States v. Morillo 782
United States v. Ortega 782
United States v. Repentigny 371
United States v. Sanchez 782
United States v. Shanks 298
United States v. Stanley 7
United States v. Stone 178, 327, 606, 637
United States v. Throckmorton 414
United States v. Vallejo 8
Vallette v. Bennett 216
Van Rensselaer v. Kearney 574, 581
Veeder v. Guppy 491
Vest v. Weir 12
Vickroy v. Pratt 12
Walcott v. Desmoines Navigation Co 402, 437, 753
Walden v. Bodley 178
Wales v. Bogue 216
Walker v. Shephardson 550
Walker v. Smith 725
Wallace v. Wilson 728
Walworth v. Kneeland 722
Warburton v. Mattox 232
Ward v. Mulford 528
Watkins, *ex parte* 604
Watson v. Voorhees 236
Watterson v. Bennett 607
Watterson v. Kirkwood 129
Weaver v. Fairchild 205
Webb v. Sturtevant 11
Weber v. Marshal 767
Weimer v. Lowery 10
Weisberger v. Tenny 274
Welborn v. Spears 13
Welch v. Bryan 14
Wells v. Riley 754
Wells v. Thompson 284
Wharton v. Littlefield 23
Whitaker v. Gautier 11

PAGE
Whitesides v. Rickey 14
Whitney v. Buckman 10. 232
Whitney v. Gunderson 702
Whitney v. Morrow 702
Wiggins v. Guier 171
Wilcox v. Howell 706
Wilcoxon v. McGehee 769
Wilkerson v. Mayfield 141
Williams v. Baker 402
Williams v. Booker 13
Williams v. Carpenter 685
Willis v. Bucher 559
Wilkins v. McCue 769
Wilson v. Mason 169
Winfield Town Co. v. Maris 274
Winn v. Patterson 314
Wood v. Ferguson 260
Wood v. Lyle 13
Wood v. M. K. and T. Railroad Co. 41
Woods v. Sawtellee 170
Wooley v. Magie 130
Worcester v. State of Georgia 332
Wray v. Doe 311. 313
Wright v. Carpenter 447
Wright v. Cradlebaugh 702
Wright v. Day 550
Wright v. Shumway 269
Wright v. Whitesides 9
Wynn v. Garland 9
Wythe v. Palmer 269
Yeates v. Pryor 569

LEADING CASES

ON

PUBLIC LAND LAWS.

ATHERTON *v.* FOWLER.

October Term, 1877.—6 Otto, 513.

1. No right of pre-emption can be established by a settlement and improvement on a tract of public land where the claimant forcibly intruded upon the possession of one who had already settled upon, improved, and enclosed that tract.
2. Such an intrusion, though made under pretence of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption.

ERROR to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

Mr. Montgomery Blair for the plaintiff in error.

Mr. S. F. Phillips contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This case originates in an action of replevin brought by Page, who died during the progress of the litigation, and is now represented by Atherton, his executor, the plaintiff in error.

The plaintiff below obtained possession of the hay, which was the subject of the writ of replevin: but, on trial before a jury, they found he was not entitled to the possession, and judgment for the value of the hay was rendered against him. This judgment was affirmed on appeal to the Supreme Court of the State, and is now brought before us for review on questions which relate to the rights acquired in the soil from which the hay was cut, or rather which might have been acquired to such soil under acts of Congress.

The hay, which is the subject of controversy, was cut in the

summer of 1863, on part of the land embraced within the Vallejo grant of the Soscol ranch.

The history of the title to that ranch is given in the report of *Frisbie* v. *Whitney*, 9 Wall., 187. The claim of Vallejo to the confirmation of the grant was finally decided against him in this court, March 22, 1862. By virtue of the thirteenth section of the act of Congress of March 3, 1851 (9 Stat., 633), the land embraced within his claim became public land of the United States whenever it was finally decided to be invalid. No public survey had been extended over these lands at that time, and the whole of the Soscol ranch was held in possession, and had been for years, under the Mexican patent to Vallejo, and by tenants or purchasers under his title.

Nevertheless a large number of persons who had previously no interest in or claim to, or possession of any part of this land, invaded it by force, tore down the fences, dispossessed those who occupied it, and built on and cultivated parts of it, under pretence of establishing a right of pre-emption to the several parts which they so seized.

The general character of this movement is well described in *Frisbie* v. *Whitney supra*.

The defendants in this case, though taking no part in the night invasion mentioned in that case, did, during the spring and summer of 1862 and 1863, enter upon the lands in the possession of Page,—land which in every instance was enclosed within fences, and which was in actual cultivation. And this entry was without asking the consent, or having in any way the permission, of those in possession, but by forcibly driving them out. The hay, which is the subject of the controversy, was cut from meadows or grounds set in grass by Page.

These facts are stated, or evidence from which the jury had a right to infer them, in a case made by the parties, on which the Supreme Court finally decided it.

But Congress, on the 3d day of March, 1863, enacted that all settlers on the land claiming under Vallejo might enter the land held by them to the extent of their actual possession at $1.25 per acre, and have a patent for the same as soon as the surveys were extended over the ranch. So that when the hay in controversy was cut, the defendants knew, or should have known, that they were mere trespassers on the lands of Page, and had no right to the hay.

It is, however, to be considered that there is the doctrine that a person having the legal title to land, but out of possession, cannot maintain the action of replevin for hay or timber cut on the land. This general doctrine has been modified both by statute and by judicial decision in the several States, until it is not easy to say exactly how much of it is left in any one of the States. In the case before us, the court, on the trial, gave the law on the subject very clearly; and, as it is a doctrine not affected by the Constitution or laws of the United States, we must take it to have been correctly expounded to the jury.

The court instructed them, that if plaintiff was in the actual possession of the land when the defendants entered, there was no disseisin; and the subsequent possession of defendants did not oust that of the plaintiff, unless they found that they had entered in good faith, with intent to pre-empt the land on which the hay was cut, and that they had the actual possession of it at the time the hay was cut. To the last part of this instruction plaintiff excepted. The court also said: "If you believe from the evidence that the defendants entered in good faith, with intention to pre-empt the land on which the hay was cut, and had actual possession of it at the time the hay was cut, your verdict should be for the defendants."

The plaintiff asked the court to charge the jury that, if he was in the actual possession of the land, having cultivated it for several years previously, and the defendants broke through his enclosure against his consent, the entry was unlawful, though the land might be public land, the prior right of pre-emption belonging to him who had the prior and continued possession. This the court refused.

In short, it is obvious that the case was made by the court to turn on the assumption that the land was, in its then condition, liable to be pre-empted by defendants, against the wishes of plaintiff, and that, to effect the entry and cultivation necessary to establish the right of pre-emption, the defendants could, by force and violence, and by breaking into an actual enclosure, and by turning the plaintiff out, acquire such right of pre-emption, and at the same time a *bona fide* possession.

Unless the laws of the United States justify this conduct, the instructions of the court were erroneous, and to the prejudice of the plaintiff in a matter involving his rights under the acts of Congress.

At the time this action was tried, Page had obtained title to the land under the act of March 3, 1865. This related back to his possession under the Vallejo grant; and the title in this action was not disputed. It was simply a question before the court in that trial, therefore, whether the intention to pre-empt the land changed what would otherwise have been a mere trespass into a *bona fide* possession which would defeat the present action.

Undoubtedly, there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter-section of land may present conflicting claims to the right of pre-emption of the whole quarter-section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter-section is open, unenclosed, and neither party interferes with the actual possession of the other.

In such cases, the settlement of the later of the two may be *bona fide*, for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become pre-emptor, or it may not be known that the settlements are on the same quarter. *Johnson* v. *Towsley*, 13 Wall., 72; sect. 15, act of Sept. 4, 1841, 5 Stat., 455.

But all these cases suppose that the parties began their possession and made their settlements, and built their houses on lands not in the actual possession of another. It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring, and the unscrupulous, to dispossess by force the weak and the timid from actual improvements on the public land, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the government when it comes into market.

A careful examination of the laws concerning the survey and sale of our public lands will show that nothing of this kind is

sanctioned, and that so many other ways are open to purchasers of these lands that no such proceeding is necessary to enable any one to secure his rights. In the earliest stages of our land system no right or interest could be secured by the individual in any public land until it had been surveyed into legal subdivisions; nor after this had been done was it subject to sale, until, by a proclamation of the President, it was brought into market. This proclamation always fixed a time and place when the lands within a given district were to be offered for sale at public auction; and until all of them were sold which could be sold in this manner, at prices above the minimum fixed by law, no one could make a private entry of a particular tract, or establish a claim to it. The scenes of violence, fraud and oppression, and the combinations which attended these sales, and the wrongs perpetrated under them, led to the law of pre-emption. It often occurred that emigration, in advance of the readiness of the public lands for these sales, had caused hundreds and thousands to settle on them; and, when they came to be sold at public auction, their value, enhanced by the houses, fences, and other improvements of the settler, placed them beyond his reach, and they fell into the hands of heartless speculators. To remedy this state of things the pre-emption system was established. This, at first, was only applicable to lands which had been surveyed; but gradually this was changed, until, in 1862, pre-emptions were allowed, under proper restrictions, on unsurveyed lands as well as those surveyed. Act of June 2, 1862, 12 Stat., 418.

It may, therefore, be said that at the time the transactions occurred of which we are speaking there were three modes of securing title to public land: 1. By purchase at the public land sales ordered by the President. 2. By private entry; that is, by going to the land officer and paying at the rate of $1.25 or $2.50 per acre for any land subject to private entry or sale at those rates respectively. 3. By pre-emption.

Both the former modes contemplated the immediate payment of the money, and the right of the party to the land was fixed when this was done. He had then a vested interest, which became a perfect legal title when he received his patent. This was usually after such delay as was necessary to ascertain if there were any conflicting claims or rights to the land.

But the pre-emption of land did not require or admit of payment at the time the right of pre-emption was exercised. The land

might not have been surveyed, and then it could not be identified or described so as to cause a patent to issue on it. The law also intended to give the settler time to build a house, break up the ground, and make a settlement first and payment afterwards.

During this preliminary period he had no vested right to the land; but, as we have elsewhere decided, he did thus acquire the right of preference in the purchase; that is to say, if he made the necessary settlement and improvement, and the necessary declaration in writing, no other person could buy the land until the period elapsed which the law gave him to pay the purchase-money. *Frisbie* v. *Whitney*, 9 Wall., 187; *Hutchings* v. *Lowe*, 15 id., 77.

Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling-house thereon. Sect. 2259, Rev. Stat.

At the moment the land on which the hay in this case was cut became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, 1, settled on by them in person; 2, inhabited and improved by them; and, 3, it had dwellings erected on it by them.

Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorise a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right to pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorise him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land—to make improvements on unimproved land. To erect a dwelling-house did not mean to sieze some other man's dwelling. It had reference to vacant land, to unimproved lands; and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by tres-

pass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

We have not been able to find any decision of the courts directly in point on this question: but in the case of *The United States* v. *Stanley*, 6 McLean, 409, Mr. Justice McLean gave expression to the opinion that where a man was engaged in erecting a house in order to make a pre-emption claim to lands purchased of the Miami Indians, another person, who by force turned him out of the house, and having finished it took up his residence there, could not by that proceeding acquire a valid settlement, unless the other party voluntarily withdrew all claim to the property. The case in regard to the trespass is very like the one before us, and, though the validity of the entry of the trespasser was only remotely in question, the remark of the learned justice, who was familiar with the laws regulating the sales of public lands, is entitled to respect.

So, also, in the case of *Frisbie* v. *Whitney*, before mentioned, this court said, that while it was not necessary to decide it, there were serious difficulties in regard to complainant's right to make a valid pre-emption by a forcible intrusion upon land cultivated, enclosed, and peaceably occupied by another man.

In the present case we are met with that question directly in our way, and we are of opinion that it cannot be done.

It follows that the defendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry: that they were naked trespassers, making an unwarranted intrusion upon the enclosure of another—an enclosure and occupation of years, on which time and labor and money had been expended—and that in such a wrongful attempt to seize the fruits of other men's labor there could be no *bona fide* claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous, and the judgment founded on it must be reversed.

The judgment of the Supreme Court of California will, therefore, be reversed, and the case remanded, with instructions to order a new trial, and for further proceedings in conformity with this opinion; and it is *So ordered.*

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE CLIFFORD, dissenting.

I dissent from this judgment. It is not claimed that when the defendants entered, Page had title to the lands on which the hay was cut. After the judgment of this court in *United States* v. *Vallejo*, 1 Black, 541, against the validity of the "Soscol" grant, the lands became public lands of the United States: and the occupancy of Page from that time, covering as it did a tract of more than eight hundred acres, did not, in my opinion, prevent a peaceable entry by the defendants, in good faith, for the purposes of pre-emption. The case was fairly put to the jury upon that question.

NOTE.—This act withdrew the land from the operation of the general pre-emption law to the extent of such of it as had been purchased *bona fide* from Vallejo, and reduced to possession prior to the rejection of the claim. *Page* v. *Hobbs*, 27 Cal., 484; *Hutton* v. *Frisbie*, 37 Cal., 475.

Possessory rights, or "claims" on the public lands are recognized by the laws and customs of, probably, all the public land States and territories; and rights are protected, and contracts made in relation to them are enforced.

The foundation of all such rights is actual possession, and upon the abandonment of the possession the right or claim is also abandoned. *Lonsdale* v. *Portland City*, 1 Deady, 1, 39.

No right or claim can be obtained to land reserved from sale, upon which a valid contract can be based. *Dupas* v. *Wassell*, 1 Dill., 213.

ALABAMA.

One in possession of public land is a tenant at will of the United States, and may maintain an action of forcible entry and detainer against another who enters without title. *McDonald* v. *Gaylor*, Minor's Rep., 98; *Duncan* v. *Potts*, 5 Stew. & P., 82.

His improvements are not subject to execution and sale. *Rhea* v. *Hughes*, 1 Ala., 219. Such improvements constitute part of the realty and pass to the purchaser from the government, and should such purchaser, after his entry of the land, agree to pay for such improvements, such agreement would be without consideration and void. *Shaw* v. *Boyd*, 1 Stew. & P., 83. A note given for such improvements could not be collected. *Duncan* v. *Hall*, 9 Ala., 128.

But things that are severed from the land at the time of the purchase, such as rails and boards, even though they were made from timber cut off the land, and bricks made from the soil of the land, do not pass to the purchaser, even if they are still on the land at the time of the purchase. *Carpenter* v. *Lewis*, 6 Ala., 682.

ARKANSAS.

The interest that persons possess in an improvement upon public land a possessory right or interest against all the world but the United

States, and this is secured to him upon the principles of natural justice. It partakes, in some degree, of the nature of a chattel real—the interest vests in the personal representatives, and may be sold by them without the intervention of the probate court. *Pelham* v. *Wilson*, 4 Eng., 530, and 4 Ark , 289. The widow has no dower interest in the land. *Crittenden* v. *Woodruff*, 14 Ark., 465; *Crittenden* v. *Johnson*, 14 Ark., 447.

A sale of such improvements, while the land belongs to the United States, is a sufficient consideration to support an action. *Hughes* v. *Sloan*, 3 Eng., 146; *Ferguson* v. *McCain*, 23 Ark., 210; *Sherrer* v. *Bullock*, 23 Ark., 729. But a promise made by the purchaser from the government, after such purchase, to pay the settler for improvements made prior to the entry, is without consideration and void, as by his purchase from the government he acquired the right to all improvements on the land. *McFarland* v. *Mathis*, 5 Eng., 560. But not to wood cut on the land before entry; this may be removed after the entry by the person who cut it. *Brock* v. *Smith*, 1 Barb., 431.

The purchaser of public lands is entitled to all improvements and growing crops. *Gibbons* v. *Dillingham*, 5 Eng., 9; *Floyd* v. *Ricks*, 1 Barb., 286; *Wynn* v. *Garland*, 3 Barb., 440; *Graham* v. *Roark*, 23 Ark., 19.

CALIFORNIA.

The right to occupy public land is vested in the first possessor. *Coyell* v. *Cain*, 16 Cal., 567. Possession carries with it the privileges and incidents of ownership. *Crandall* v. *Woods*, 8 Cal., 136, and the right of undisturbed enjoyment of the land against all the world except the United States. *Tartar* v. *Spring Creek Mining Co.*, 5 Cal., 395. One in possession under a judgment of a court is presumed to be rightfully in possession until some other show a right of possession derived from the United States. *Rich* v. *Maples*, 33 Cal., 102.

A person may hold any amount of public land he has enclosed. *Dyson* v. *Bradshaw*, 23 Cal., 528. But not against one who enters upon 160 acres of it to acquire title by pre-emption. *Townsend* v. *Little*, 45 Cal., 673.

One claiming the right to hold possession of land against a prior possessor upon the grounds that he held as a pre-emptor, must show that he has all the qualifications of a pre-emptor. *Page* v. *Hobbs*, 27 Cal., 484.

An entry on public land gives only the right of possession to that part actually occupied or enclosed. *Wright* v. *Whitesides*, 15 Cal., 46. Occupying part of a quarter-section and cutting hay off another part of it does not give possession of the whole quarter-section. *Garrison* v. *Sampson*, 15 Cal., 93.

Commencing to build a fence to enclose the land does not give a preferred right of possession. *Cummings* v. *Scott*, 20 Cal., 83. But commencing to build a house on the land does. *Stark* v. *Barnes*, 4 Cal., 412.

Prior possession of public land will entitle the possessor to main-

tain an action against a trespasser upon the land. *Grover* v. *Hawley*, 5 Cal., 485; *Bradshaw* v. *Treat*, 6 Cal., 172; *Conger* v. *Weaver*, 6 Cal., 548; *Bird* v. *Dennison*, 7 Cal., 297. All such possessory rights are subject to the rights of miners. *McClintock* v. *Bryden*, 5 Cal., 97; *Burdge* v. *Underwood*, 6 Cal., 45; *Weimer* v. *Lowery*, 11 Cal., 104.

If a settler lay out a town on the land settled upon he may maintain an action of ejectment against one who intrudes on any part of it. *Plume* v. *Steward*, 4 Cal., 94.

A settler, even if he settled with the intention of pre-empting the land, may mortgage the land, and it may be sold under execution, (*Whitney* v. *Buckman*, 13 Cal., 536,) even after he has filed his pre-emption claim. *Montgomery* v. *Whitney*, 40 Cal., 294.

A sale of a possessory right is a valid consideration for a note given for the purchase. *Tartar* v. *Hall*, 3 Cal., 263.

If one in possession executes a mortgage and then sells, and his grantee pre-empts the land, the mortgage cannot be foreclosed, for the pre-emptor holds title under his pre-emption entry and not under his grantor's possessory right. *Bull* v. *Shaw*, 48 Cal., 455. Also if land is sold under execution and the purchaser put in possession, the original possessor may settle on another part of the quarter-section and pre-empt the whole quarter-section. *Montgomery* v. *Whitney*, 40 Cal., 294. Also after he sells by quit claim deed he may pre-empt the land, and after he has made proof and payment, he can hold against his grantee. *McDonald* v. *Edmonds*, 44 Cal., 328.

If a settler mortgage the land, the mortgage is not defeated by the mortgagor filing a pre-emption claim. *Hemphill* v. *Davies*, 38 Cal., 577.

If a settler sells by deed, and his assignee sells again by parol, and the purchaser takes possession, the holder by deed can recover possession, although the possessor has held possession under the parol purchase for two years, and has put valuable improvements on the land. *Stephens* v. *Mansfield*, 11 Cal., 363.

If a settler gives possession to one under an agreement to purchase, and such person files a homestead claim on the land, the prior occupant cannot recover possession. *Holden* v. *Andrews*, 38 Cal., 119. But if the seller takes a vendor's lien on the land, it cannot be defeated by such homestead entry. *Kelly* v. *Mack*, 49 Cal., 523.

The sale of a settler's right, under execution, may be defeated by the settler entering the land as a homestead, but he must pay rent to the purchaser under the execution from the date of sale to the date of the entry. *Emerson* v. *Sansome*, 41 Cal., 552.

A settler is entitled to pay for damages to his improvements on public land, caused by a railroad passing through his lands, although such railroad company has a grant from the United States of the right of way over the public land. *Northern R. R. Co.* v. *Gould*, 21 Cal., 254. (*Contra*, see *Central Pacific R. R. Co.* v. *Dyer*, Sawyer, 641.)

All possessory rights cease as soon as the land is sold by the United

States, and the improvements attached to the soil pass to the purchaser from the government, and the act of the legislature of March 30, 1868, is void so far as it authorizes the removal of such improvements after the land has been sold by the United States. *Pennybecker* v. *McDougal*, 48 Cal., 160. But improvements not attached to the soil may be removed. *Collins* v. *Bartlett*, 44 Cal., 371.

COLORADO.

Title by occupancy of public land, subject to entry under the town site act, is, by the laws of this Territory, real estate, and descends to the heirs at law. *Gillett* v. *Caffney*, 3 Colo., 351.

FLORIDA.

A sale of improvements on public land, by a pre-emptor, is a valid consideration for a note given for the payment. *Taylor* v. *Baker*, 1 Fla., 245.

IDAHO TERRITORY.

A settler on public lands may maintain an action of ejectment against one who intrudes upon his possession. *Fierbaugh* v. *Materson*, 1 Idaho Ter., 153.

ILLINOIS.

The possession of public land is made property by a statute of the State. *Switzer* v. *Skiles*, 3 Gil., 529.

If the land be unsurveyed, the lines of the claim must be plainly marked, (*Sargent* v. *Kellogg*, 5 Gil., 273,) and the possession must be actual. *Gleason* v. *Edmonds*, 2 Scam., 448; *Whitaker* v. *Gautier*, 3 Gil., 443.

The occupant may maintain an action of ejectment against any intruder. *Webb* v. *Sturtevant*, 1 Scam., 181. He may legally sell his possession and improvements. *Bradshaw* v. *Newman*, Breese Rep., 94; *Carson* v. *Clark*, 1 Scam., 113; *Doyle* v. *Knapp*, 3 Scam., 334.

His possession and improvements may be sold to enforce a mechanic's lien (*Turney* v. *Saunders*, 4 Scam., 527); and they pass as assets to an assignee in bankruptcy. *French* v. *Carr*, 2 Gil., 664.

Upon the land being sold by the government, all possessory rights cease. *Switzer* v. *Skiles*, 3 Gil., 529. All improvements on the land pass with the land to the purchaser. *Attridge* v. *Billings*, 57 Ill., 487; *Cook* v. *Foster*, 2 Gil., 652. But all movables, such as rails and lumber, although cut off the land previous to the entry, do not belong to the purchaser from the government. *Blair* v. *Warley*, 1 Scam., 178.

INDIANA.

The purchaser of public land is entitled to all improvements on the land, even if they were placed on the land by an adjoining owner by mistake (*Seymour* v. *Watson*, 5 Blackf., 555), and all growing crops. *Rasor* v. *Quaills*, 4 Blackf., 286.

An agreement by such purchaser, made after purchase, to pay a

squatter for improvements on the land at the date of the purchase, is without consideration and void. *Boston* v. *Dodge*, 1 Blackf., 19; *Carr* v. *Allison*, 5 Blackf., 63. But money paid for such improvements cannot be recovered back. *Vest* v. *Wier*, 4 Blackf., 135.

IOWA.

Claims on the public land are property, and agreements relating to them are legal and binding. *Ellis* v. *Mosier*, 2 Green, 246.

To constitute a claim, the boundaries must be plainly marked. *Jones* v. *Donahoo*, Morr. Rep., 493.

Claims may be legally sold as property (*Hill* v. *Smith*, Morr. Rep., 70), and the law implies a warranty of title to the claim. Should the claim fail, the money paid may be recovered back. *Bowman* v. *Torr*, 3 Iowa, 571.

An action of ejectment may be maintained against an intruder. *Lorimer* v. *Lewis*, Morr. Rep., 253.

Such possessory rights are personal property (*Bowman* v. *Torr*, 3 Iowa, 571), and go to the administrator upon the death of the occupant. *Stewart* v. *Chadwick*, 8 Iowa, 463.

The moment the land is sold by the United States, the possessory right or "claim" ceases. *Hamilton* v. *Walters*, 3 Green, 556.

The purchaser of public lands takes all improvements on the land. *Burlerson* v. *Teeple*, 2 Green, 542. But loose rails, not put up, do not pass with the land to the purchaser. *Robertson* v. *Phillips*, 3 Green, 220.

KANSAS.

A settler on public land has the right of possession against every one except the United States. *Jordan* v. *Updegraff*, McCahon Rep., 103.

Buildings and town lots on the public land may be levied upon and sold under execution. *Feesler* v. *Haas*, 19 Kan., 216.

A note given for improvements and possession of public land can be collected. *Bell* v. *Parks*, 18 Kan., 152. But if the Indian title had not been extinguished, such settlement and improvement was prohibited, and therefore, could not be the basis of a valid contract. *Stone* v. *Young*, 4 Kan., 17; *Vickroy* v. *Pratt*, 7 Kan., 238.

LOUISIANA.

A settler on public lands will be protected in his possession to the extent of his enclosure (*Miller* v. *Lelen*, 19 La., 331; *Griffin* v. *Cotton*, 1 Rob., 142., and the pre-emption act of 1841, does not authorize a person to enter on land in the possession of another for the purpose of acquiring a pre-emption right to the land. *Bonis* v. *James*, 7 Rob., 149. But possession, however protracted, will not confer a title or right of possession as against the grantee of the United States. *Pepper* v. *Dunlap*, 9 Rob., 283.

A settler having a right of pre-emption may legally sell his possession and improvements. *Ratcliff* v. *Bridger*, 1 Rob., 57; *Bryan* v. *Glass*, 6 La., 740. He may also sell if he is in a situation to avail himself of a

pre-emption right (*Dean* v. *Wade*, 15 La. Ann., 230,) and in the absence of evidence as to this, the court will presume that the settler had a pre-emption right. *Price* v. *Curran*, 5 La. Ann., 686; *Norman* v. *Ellis*, 5 La. Ann., 693.

If a sale is made under a mutual mistake, both the settler and the purchaser supposing that the land could be entered by the purchaser, while in fact the land was reserved from sale, the sale is void on account of the mutual mistake. *Theroit* v. *Chandoir*, 17 La., 445. Also, if the settler is not in a situation to avail himself of a pre-emption, he being a trespasser upon the public land, his possession and improvements cannot form the subject of a valid contract. *Sperlin* v. *Milliken*, 16 La. Ann., 217.

The improvements of the settler are personal property, not real estate. *Broussard* v. *Dugas*, 5 La. Ann., 585.

The purchaser of public land takes all improvements on the land. *Harriot* v. *Broussard*, 4 Mart. N. S., 260; *Wood* v. *Lyle*, 4 La. Ann., 145; *Jenkins* v. *Gibson*, 3 La. Ann., 203; *Hellon* v. *Sapp*, 4 La. Ann., 519; *Jones* v. *Whedis*, 4 La. Ann., 541. It is held otherwise if the improvements belong to a settler claiming the right of pre-emption, (*Williams* v. *Baker*, 12 Rob., 253; *Gibson* v. *Hutchings*, 12 La. Ann., 545,) or one who has settled on the land in good faith believing he had a good title to the land. *Pearce* v. *Franlurn*, 16 La., 414.

MINNESOTA.

The relinquishment of a homestead by a settler is a sufficient consideration for a note given by one who desired to enter the land. *Lindersmith* v. *Schwiso*, 17 Minn., 26.

A contract to sell a lot in a town site on public land before the land is entered, is valid. Transferring possession is sufficient consideration to support the contract. *Maxfield* v. *Bierbauer*, 8 Minn., 413.

MISSISSIPPI.

The purchaser of public lands is entitled to all the improvements on the land at the time of entry. *Welborn* v. *Spears*, 32 Miss., 138.

A note given for improvements on public land to one not having a preference right of entry is without consideration and void. *Merrill* v. *Legrand*, 1 How., 150; *Lindsey* v. *Sellers*, 26 Miss., 169.

MISSOURI.

Possession of public land does not extend beyond that enclosed. *Sloan* v. *Moore*, 7 Mo., 170; *Ely* v. *Ellington*, 7 Mo., 302.

A sale of improvements on public land is valid (*Stubblefield* v. *Branson*, 20 Mo., 301,) and such improvements being personal property, may be sold by parol. *Clark* v. *Schultz*, 4 Mo., 235.

They cannot be levied upon and sold under execution. *Hatfield* v. *Wallace*, 7 Mo., 112.

The purchaser of public land takes by his purchase all improvements on the land, and a contract by such purchaser to pay for improvements

put on the land before his entry, is without consideration and void. *Burns* v. *Hyden*, 24 Mo., 215; *Welch* v. *Bryan*, 28 Mo., 30. But if such improvements were put on the land under an entry that was afterwards canceled, compensation may be allowed. *Russell* v. *Defrance*, 39 Mo., 506.

The purchaser from the government is not entitled to wood cut and left on the land before his entry (*Keeton* v. *Audsley*, 19 Mo., 362,) and if he appropriate such wood he is liable for its value, to the person who cut it. *James* v. *Snelson*, 3 Mo., 393; *Contra*, *Turley* v. *Tucker*, 6 Mo., 583.

He is entitled to all growing crops (*Boyer* v. *Williams*, 5 Mo., 335); and he may maintain an action against one who removes a fence from the land, although it was placed there while the land belonged to the government. *Gale* v. *Davis*, 7 Mo., 544.

NEVADA.

Under the State statute a person can hold possession of public land by filing a notice in the county court, as directed by the statute, without actual residence on the land. *Desmont* v. *Stone*, 1 Nev., 378. If such notice is not filed actual possession is required. *Sankey* v. *Noyes*, 1 Nev., 68. But timber land may be held by marking the lines of the land claimed. *McFarland* v. *Culbertson*, 2 Nev., 280.

The purchaser of public land is entitled to all improvements on the land, and he may maintain an action against one who had a steam mill on the land when he purchased from the government, for removing it after his entry. *Treadway* v. *Sharon*, 7 Nev., 37.

One claiming the right of possession of public land, as against a prior occupant, by reason of a pre-emption right, must allege and prove he has all the qualifications to entitle him to a pre-emption. *McFarland* v. *Culbertson*, 2 Nev., 280.

A quit-claim deed made by a settler on unsurveyed land, will not convey the title afterwards acquired by virtue of a pre-emption entry and patent. *Hardin* v. *Cullins*, 8 Nev., 84.

OREGON.

The courts will protect settlers on public land in their peaceable possession. *Woodsides* v. *Rickey*, 1 Oreg., 108. But will not review the decisions of the land department as to the right of possession, where neither party has obtained title from the government (*Pin* v. *Morris*, 1 Oreg., 230,) or while contests are pending between the parties, before the land department. *Moore* v. *Fields*, 1 Oreg., 317.

JAMES A. LINDSEY AND OTHERS, Appellants, *v.* HAWES.

December Term, 1862.—2 Black, 554; 4 Miller, 820.

Action of Land Officer in issuing Patent may be Reviewed in Equity—Pre-emption—Residence on Boundary Line.

1. On a re-examination of the adjudged cases, this court holds that, when a pre-emptor has proved his claim, paid his money, and received a certificate of entry from the proper land officer, the action of the commissioner of the land office in setting aside his entry, without notice to him or his heirs, and selling and giving a patent for it to another, does not preclude the party first mentioned from asserting his rights in a court of equity.
2. When the government has made a survey of its lands, with a plat which has been approved by the proper officer, and by that survey has sold the land and received the money for it, and given a certificate of purchase, it is bound by the survey and sale, and cannot of its own motion make a new survey, so as to defeat the title it had sold, by showing that the pre-emptor did not occupy the specific congressional subdivision which he had rightfully claimed to do by the first survey.
3. But this is not intended to deny the right of the government to compel payment for any additional quantity of land found to be included in the sale by the new survey.
4. Taking the original survey as furnishing the lines by which plaintiff's occupation and residence on the land he claimed is determined, it is established as a fact that his house was on the dividing line between two quarter-sections, one of which he pre-empted. This was a residence in both, and authorised him to select in which he would claim the right of entry, as he had possession of both.
5. The plaintiffs, the heirs of the pre-emptor, are therefore entitled to conveyance of the legal title from the defendants, who hold the legal title by patent from the United States, which equitably belongs to plaintiffs.

APPEAL from the Circuit Court for the Northern District of Illinois.

The case is fully stated in the opinion.

Mr. Grant for appellants; *Mr. Scates* for appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the Northern District of Illinois, in which the appellants here were claimants there.

The subject of the litigation is the legal title to the southwest part of the northeast fractional quarter of section No. 36, in town-

ship No. 18, of range No. 2, west of the fourth principal meridian, in the county of Rock Island, Illinois. The course of the Mississippi river at this point is almost due west, and that portion of its waters which flows south of the island of Rock Island divides the northeast quarter of section 36 into two parts, one of which, the smaller, is south of the stream, and the other constitutes a portion of the island.

The section was surveyed in the year 1833 by Bennett, the government surveyor, and the survey duly filed in the proper office. The meanders of the Mississippi river, the quarter-section posts, and the area of the fractional quarters, were all given by the survey. It appeared by it that the south line of the quarter-section impinged upon the river at a point near the centre of the line, and thus divided that part of the quarter which was south of the river into two separate fractions. The computation of this survey gave the contents of the east fraction at 1.87 acres, and of the west fraction at 5.17 acres. It is this latter parcel which is in contest. In April, 1839, Thomas Lindsey made application to the receiver and register of the land office at Galena to purchase the land, claiming a right of pre-emption under the act of 1838 by reason of cultivation and actual residence thereon, and having established his claim to the satisfaction of those officers, he received from them on the 3d day of June, 1839, the proper certificate stating the receipt of the purchase-money, and that, on its presentation to the Commissioner of the General Land Office he would be entitled to a patent. Shortly after receiving this certificate, Thomas Lindsey removed with his family across the river into Iowa, and died on the 14th of September of the same year, a little more than three months after its date. The present plaintiffs are his heirs, and were all, at the time of his death, either minors or *femes covert*, except James A. Lindsey. No patent ever issued to Thomas Lindsey or his heirs on this entry.

In 1845 David Hawes claimed a pre-emption right under the act of 1841 for the same fractional southwest part of the northeast quarter of section 36, and in December received the certificate of the register and receiver that he had purchased and entered it, and March 1, 1848, received from the government a patent.

The object of the present suit is to compel from said David Hawes and the other defendants, who are his grantees, a conveyance to the plaintiffs of the legal title thus obtained by Hawes from the government.

As Hawes took his patent from the United States with full knowledge of the certificate previously issued to Lindsey, it is quite clear that upon the facts above stated, without more, the complainants would be entitled to the relief prayed for in their bill. But the defendant Hawes, who alone has answered, set up other facts upon which he relies as a full defence to the claim of the plaintiffs. There are in the record the depositions of some forty witnesses, besides letters and other documentary evidence, all of which have received the careful attention of the court; although it will be found that the case must be decided upon a few facts, about the truth of which there is but little conflict. These will be considered as we progress.

On the 9th August, 1845, James Shields, Commissioner of the Land Office, set aside the entry of Lindsey, ordered his certificate to be canceled, and directed the register and receiver to hear proof of the right of David Hawes, and to adjudicate his claim.

They accordingly heard his proof, and gave him the certificate, on which he afterwards obtained his patent as before recited. It is claimed by the counsel of Hawes that this action of the land officers, including that of the commissioner, was a conclusive and final adjudication of the matters now set up in the plaintiffs' bill, and that the courts of law cannot go behind these proceedings to correct any injustice which may have been done to plaintiffs. The proposition as thus broadly stated, and as necessarily so stated by defendant's counsel to avail him in this case, cannot be conceded. It appears from the evidence before us, that the ground on which the commissioner set aside the entry of Lindsey, was that there had been a mistake in the survey made by Bennett in 1833, and that by another survey made by order of the commissioners in 1844, it was ascertained that the house in which Lindsey resided when he made his claim in 1839, was not on the land for which he received his certificate of entry from the receiver and register.

The order for this new survey emanated from the Commissioner of the Land Office, June 1, 1844, and the survey was actually made in the autumn of that year, five years after Lindsey's entry, and five years also after his death, and there is no proof whatever that any of his heirs had notice of this survey, or of any intention on the part of the commissioner to set aside Lindsey's entry; but the whole proceeding was *ex parte*. It is true that

subsequently, when the claim of David Hawes to a right to enter this land came before the register and receiver, James A. Lindsey seems to have had some kind of notice; but this was given him in regard to an attempt on his part to enter this land for himself, on a claim of improvement made by himself, having, as is clearly shown, no relation whatever to the right established by his father, Thomas Lindsey. Nor did the other heirs of Thomas Lindsey have any notice of the proceedings by which David Hawes established his claim before the register and receiver. These heirs were not in any sense parties to any of the proceedings by which the title to the land which their ancestor had bought of the government was vested in David Hawes, and their claim was annulled.

Under these circumstances we have no hesitation in holding that the action of the officers of the land office was not conclusive upon their rights, and that a court of equity may enquire into the proceedings by which the title was vested in Hawes, and afford relief if a proper cause for it is shown to exist. That this is the settled doctrine of this court, a reference to a few of its decisions will show.

In the case of *Cunningham* v. *Ashley et al.*, 14 Howard, 377, Cunningham appeared before the receiver and register, and claimed the right, under the pre-emption laws, to enter the land which was the subject of controversy. These officers decided that he had no right to do so, and rejected his claim. He again and repeatedly presented his claim, and tendered the price of the land. His claim received the consideration of the Commissioner of the Land Office, of the Attorney General, and of the Secretary of the Treasury, and was finally rejected. The defendants were permitted to enter the land, and receive from the government patents for it. Justice McLean, in delivering the opinion of the court, says that this final decision of the officers of the department was the result of twenty years of controversy; and, speaking in reference to the plaintiff's rights, he says: "They were paramount to those acquired under the new location. Those rights were founded on the settlement and improvement in 1821, and on the acts done subsequently in the prosecution of his claim. Having done everything which was in his power to do, the law requires nothing more." Again: "So far as the new entries interfered with the right of complainants, they were void." "The officers of the government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it. The

court decreed that the defendants should convey to Cunningham, who had the paramount equity. In this case, which had been long contested, and had received the consideration of the receiver, register, Commissioner, Attorney General, and Secretary of the Treasury, all of whom had concurred in rejecting plaintiff's claim, he had never received any certificate nor actually paid any money, yet the court held that it would look into the equities of the case and set aside the acts of all these officers, because they had erred, to use the language of the court, both as to the law and the facts to the prejudice of complainant." In *Barnard's Heirs* v. *Ashley's Heirs*, 18 How., 43, this court again decided that it would inquire into the facts of a disputed entry, notwithstanding the decision of the register and receiver.

But the clearest statement of the rule established by this court on this subject is to be found in the case of *Garland* v. *Wynn*, 20 How., 8. Wynn's entry, which was the elder, had been set aside, and the money refunded and a patent certificate awarded to Hemphill, who assigned to Garland, to whom the patent issued. Wynn brought his suit in equity to compel from Garland the conveyance of the legal title, on the ground that these proceedings were illegal, and that he had the equitable right. Garland insisted that the Circuit Court had no authority or jurisdiction to set aside or correct the decision of the register and receiver, and that their adjudication was conclusive. Mr. Justice Catron, in delivering the opinion of the court, says: "The general rule is that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys* v. *Vasse*, 1 Peters, 212, and the case before us belongs to the same class of *ex parte* proceedings. Nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court." In *Lyttle et al.* v. *State of Arkansas et al.*, 22 How., 192, the same member of the court, delivering its opinion, says: "Another preliminary question is presented on this record, namely, whether the adjudication of the register and receiver which authorized Cloy's heirs to enter the land is subject to revision in courts of justice, on proof showing that the entry was obtained by fraud and the imposition of false testimony on those officers

as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion."

We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by defendants on this branch of the case.

We now proceed to inquire into the grounds upon which the entry of Thomas Lindsey was set aside, and the application of David Hawes to enter the same land was allowed. It appears that some five years after Lindsey's entry was made, upon the suggestion of Silas Reed that there was an error in Bennett's survey of this quarter, the commissioner ordered a new survey to be made of that section. This survey was made for the government by George B. Sargent in the fall of 1844. It differed from the original survey in two particulars, namely, that the southwest fractional quarter was found to contain 13.23 acres instead of 5.17, and the south line of the quarter-section was located so far north as to leave the house in which Lindsey resided when he made his entry entirely south of the quarter.

The act of June 22, 1838, under which Lindsey claimed his right of pre-emption and made his entry, provides: "That every actual settler of the public lands, being the head of a family, over twenty-one years of age, who was in possession, and a housekeeper, by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of an act entitled 'An act to grant pre-emption rights to settlers on public lands.'" It is shown by the letter of James Shields, Commissioner of the General Land Office, dated August 9, 1845, to the register and receiver at Dixson, that Lindsey's entry was set aside by him because, by the re-survey, Lindsey's house was not on the fractional quarter in controversy. We are not prepared to admit that if the second survey be the correct and proper subdivision of that section into quarters and fractions of quarters, and that by this survey (though otherwise by the former) the house of Lindsey was found not to be in the fraction pre-empted by him, the commissioner could, for this reason alone, set aside, in this summary manner, the sale of the land made by the government to Lindsey. It is to be remembered that the original survey of Bennett was the survey of the government; that it was made in 1833; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years the government had acted upon and

recognized it as valid and correct; and above all, had sold the land to Lindsey by this its own survey, received the purchase-money and given him a patent certificate, five years before any suggestion was made of this error. The money thus received by the government has never been returned, nor do we think it would vary the rights of the parties if it had been actually tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter-section affect the question of the precise locality of Lindsey's residence, as bearing on his right to enter that fraction as a pre-emption, the government was bound by the original survey of Bennett.

We do not here deny the right of the government, which has sold land by the acre at a fixed price, to make a new survey before it parts with the title, and if there is more land than was paid for, to require the deficiency to be paid before it issues a patent.

On that subject we decide nothing, because it is not necessary in this case. Lindsey's heirs were never notified of the additional number of acres found to be in the fraction, nor were they required or permitted to pay for this increase.

The language of the act of 1838, already quoted, certainly required of Lindsey that he should have possession, by personal residence thereon, of the land which he entered; and if he had not such residence, or rather such possession, the commissioner was justified in vacating the entry. But this fact must be determined on the basis of Bennett's survey.

On this point a few facts found among the mass of testimony in the record, about which there is scarcely a dispute, will enable us to form a just conclusion.

The east and west lines which divide a section into north and south quarter-sections are not usually run out and marked by the government surveyors; but instead of this, as they run the north and south lines, they set up on these lines what they call the quarter-section posts—that is, they mark the points where this line should begin and end. When Lindsey was about to make his pre-emption claim, in order to ascertain whether he resided on this fraction, he procured the county surveyor of Rock Island county to come and run this quarter-section line. Several of the witnesses who were present when this survey was made have testified in the case, and C. H. Stoddard, a practical surveyor of intelligence and candor, as shown by his testimony, also made a survey from Bennett's field notes since this suit was instituted. Some of the persons

present when the survey was made by Baxter, the surveyor of Rock Island county, looked through the compass and observed where the line struck Lindsey's house, and a notch was made on his stone chimney where the line was seen to touch it, which was there when the depositions were taken in this suit, and was identified by witnesses who saw it made. The fair result of all the testimony on this point is, that the house in which Lindsey resided was directly on this line, which would intersect the house so as to throw perhaps the larger part on the other quarter, and a part something less than half into this quarter.

It is proved that he had another building on this fraction wholly, which is sometimes spoken of as his stable, and sometimes as a blacksmith shop, in which he worked at that trade. It is also shown that the ground cultivated by him was exclusively on this fraction, and the proof of its cultivation and inclosure is quite clear. On these facts, was he, within the meaning of the statute, in possession of this fraction by personal residence thereon?

The counsel for appellees has made a vigorous argument in support of the negative of this question. Assuming that Lindsey could not have a residence on both the northeast and southeast quarter-sections at one time, and claiming that the case is to be governed by the analogies of a question of domicile in a case of conflicting jurisdictions, he has made an apparently strong case out of the fact that the larger portion of the house is on the south side of the line. This, however, is not a case of domicile under different governments or conflicting jurisdictions. It is a question arising under the government of the United States, and concerns a construction of one of its most benevolent statutes, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. The government which made the law owned both quarter-sections, and was indifferent as to which should be sold to Lindsey, provided it was legally done. Lindsey's house was on both quarter-sections. He lived or resided in all that house. So far as mere personal residence is concerned, we think he may be correctly said to have resided on both quarter-sections. The law only required that he should personally reside on the quarter which he claimed to enter, and if he resided on both, then clearly he resided on this one.

But the language of the act makes possession the principal matter, and personal residence the qualifying matter. Leaving out the word housekeeper, which is not in question, the qualifica-

tion of a person who can pre-empt under the act. is one "who was in possession by personal residence thereon." Now, that Lindsey was in possession, is shown by his stable or blacksmith shop, by his inclosure and cultivation of the ground, or a part of it. When, in addition to these facts, a considerable part of the house in which he and his family lived, was also on this little five-acre piece of ground, may it not be said that he had possession of it by personal residence thereon?

We are of opinion that on the true construction of the statute, he had. It follows from what we have said, that the patent certificate issued to Thomas Lindsey was rightfully issued by the receiver and register, that the act of the commissioner in setting it aside was illegal, and did not destroy the right thus vested, that the land was not subject to entry by David Hawes, and that the patent obtained by him was wrongfully and illegally issued to him, and that the plaintiffs are entitled to a conveyance of the legal title from him and his co-defendants.

The decree of the Circuit Court is therefore reversed, and the case remanded to that court, with instructions to enter a decree in conformity with this opinion.

NOTE.—It was designed by the present system of surveying the public lands to provide in advance, with mathematical precision, the ascertainment of boundaries. The government sells, and the purchaser takes by metes and bounds, according to the public survey, whether the actual quantity exceeds or falls short of the amount of land estimated. *Lewen* v. *Smith*, 7 Port., (Ala.,) 428; *Brown* v. *Hunt*, 4 Ala., 129; *Cake* v. *Danks*, 13 La. Ann., 128; *Stewart* v. *Boyd*, 15 La. Ann., 171; *May* v. *Baskin*, 12 Smead & M. (Miss.) 428; *Bonney* v. *McLeod*, 38 Miss., 393; *Campbell* v. *Clark*, 6 Mo., 219, and 8 Mo., 553. Where the corners fixed by the survey can be found and identified, they are conclusive. *Sawyer* v. *Cox*, 63 Ill., 130; *Martz* v. *Williams*, 67 Ill., 306; *Irvin* v. *Rotramel*, 68 Ill., 11; *Allman* v *Stevens*, 68 Ill., 89; *Climer* v. *Wallace*, 28 Mo., 556; *Knight* v. *Elliot*, 57 Mo., 317; *Jones* v. *Kimble*, 19 Wis., 429; *Martin* v. *Carlin*, 19 Wis., 454; *Neff* v. *Paddock*, 26 Wis., 546. In disputed section corners it is a question of fact for the jury to ascertain at what precise point the disputed or lost corner was placed by the original survey. *Billingsley* v. *Bates*, 30 Ala., 376.

It has been held that the lines dividing the sections into half and quarter sections, if erroneous, may be corrected so as to equally divide the section. *Nolen* v *Parmer*, 21 Ala., 66. But a deficiency in the contents of a section must, as between a quarter-section and a residuary fraction, fall entirely on the latter, and cannot be apportioned between them. *Wharton* v. *Littlefield*, 30 Ala., 245.

Where a subdivision of a fractional section lying north of a creek is sold as containing a specified number of acres, the purchaser takes all the fraction north of the creek, although the actual number of acres exceed that specified by the survey and patent. *Stein* v. *Ashby*, 24 Ala., 521, and 30 Ala., 363

Where fractional pieces of land are bounded in part by a stream or bayou, the lines, as originally run, will control, and the purchaser will be restrained to the boundaries shown by the plat and field notes. *McCormick* v. *Huse*, 78 Ill., 363.

Public land is not treated as surveyed until the survey has been finally approved and filed in the local land office. *Collins* v. *Bartlett*, 44 Cal., 371.

CHARLES W. GAZZAM, plaintiff in error, *v.* ELAM PHILLIPS AND OTHERS.

December Term, 1857.—20 Howard, 372; 2 Miller, 475.

Construction of Patent, as to description of the Land Granted.

1. The boundaries and quantity of land granted by a patent must be ascertained by descriptive language in the patent.
2. An equity of the grantee to recover more or different land cannot control the language of the patent in an action at law. The case of *Brown* v. *Clements*, 3 How., 650; 15 Curtis, 580, overruled.

This is a writ of error to the Supreme Court of Alabama.

The case is well stated in the opinion.

Mr. J. Little Smith for plaintiff in error; *Mr. Sherman* for defendant.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Alabama.

The suit was brought in the court below to recover the possession of some four acres of land in the city of Mobile.

The lessors of the plaintiff claimed title to the lot in dispute as heirs of James Etheridge, and gave in evidence a patent from the United States to their ancestor, dated 30th May, 1833, "for the southwest quarter-section twenty-two, in township four south, of range one west, in the district of land subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said

James Etheridge." The above is a literal extract from the description of the parcel of land in the patent granted to Etheridge.

The defendant claimed under William D. Stone, and gave in evidence a patent to him from the United States, dated the 17th December, 1832, "for the south subdivision of fractional section twenty-two, same township and range, containing one hundred and ten acres and fifty-one hundreths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said William D. Stone." Etheridge gave notice to the register and receiver of his claim under the act of 29th May, 1830, on the 28th of January, 1831, and produced his proofs. Stone gave notice of his claim to the same section 25th March, 1831, and furnished his proofs. The claim and proofs in each case were received and filed, but no money was paid, nor certificates given, as the official plat of the survey of the township had not then been received at the office. This plat was returned and filed in March, 1832. There were private claims surveyed and laid down on the plat to this section, so that the portion open to the two pre-emption claims in question was confined to a fractional part of the section. This fractional part was divided, according to the plat, by a line running north and south through it, laying off in the west subdivision ninety-two and sixty-seven hundredths acres, and in the east one hundred and ten and fifty hundredths acres. Etheridge purchased the west and Stone the east subdivision.

The certificates of purchase were given to both claimants 30th April, 1832. The one to Etheridge is for the southwest quarter of section twenty-two, containing ninety-two and sixty-seven hundredths acres, the quantity in the west subdivision, at the rate of one dollar twenty-five cents per acre, amounting to $115.43; the other to Stone is for the southeast subdivision of fractional section twenty-two, containing one hundred and ten and fifty-one hundredths acres, the quantity in the east subdivision, at the rate of one dollar twenty-five cents per acre, amounting to $138.13.

The sales in each case were made in conformity with the subdivisions, as marked upon the plat of the surveyor general then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the register and receiver in making the sales.

The lessors of plaintiff also gave evidence showing that the premises in question were within the southwest quarter-section

twenty-two, computing the same according to the usual measurement of quarter-sections, and that a full quarter might have been laid off from the fraction, and claimed that the whole of the southwest quarter had been appropriated to their ancester, Etheridge, under the pre-emption act of 1830, which position was assented to by the court. The court also ruled that the purchase and patent of Stone, under whom the defendant claims, must be restrained to the fraction in the west part of the southeast quarter of section twenty-two, and that it gave him no right to the land in the southwest quarter.

The effect of this ruling, when applied to the case, gave to the heirs of Etheridge one hundred and sixty acres of the fractional section, in disregard of the official survey, the purchase and patent for only the ninety-two acres, and reduced the one hundred and ten which Stone purchased, and had a patent for, to some forty-three acres.

The court is of opinion this ruling cannot be maintained; for, conceding for the sake of argument that the plat by the surveyor general of this section was made contrary to law, the ground upon which the decision is sought to be maintained, and that Etheridge, under the pre-emption act of 1830, was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, yet it was not so surveyed, nor did he purchase, nor has he obtained a patent for the same. On the contrary, he purchased and paid for the west subdivision only of this fractional section, containing ninety-two acres, and took out a patent for the subdivision. And in addition to this, Stone, at the same time, purchased the east subdivision, as laid down on the official plat, and has received a patent for the same, and which includes the premises in question.

The patent to Etheridge, as we have seen, describes the land granted as the southwest quarter, &c., containing ninety-two and sixty-seven hundredths acres, according to the official plat of the survey of said lands returned to the General Land Office; and the patent to Stone is equally specific in the description of the parcel granted to him. The title, therefore, to the premises in question was never in the ancestor of the lessors of the plaintiff, but has been in Stone, and those holding under him, since the 17th December, 1832, the date of his patent.

The case of the claim of Etheridge to the whole of this southwest quarter, some years after the issuing of the patent to him

and Stone, was presented to the Commissioner of the Land Office for correction.

It was there elaborately examined by the counsel for the applicant, and by the Commissioner of the Land Office, and ultimately disposed of by the Secretary of the Treasury, on the opinion of the Attorney General, that officer maintaining the regularity of the survey, and of course confixing the grants to the subdivisions as laid down on the plat referred to in the patents. But, as we have already said, whether this view of the law be sound or not, it cannot control the question before us. The inquiry here is in respect to the legal title, whether it was in Etheridge or Stone, under the descriptions of land in their respective patents. Unless we can hold that it passed to Etheridge under his patent, the plaintiff must fail. And we have seen that, without disregarding the plainest terms used in the description of the tract, it is impossible to arrive at any such conclusion. We deny, altogether, the right of the court in this action to go beyond these terms, thus explicit and specific, and, under a supposed equity in favor of Etheridge, arising out of the pre-emption laws, to the whole of the southwest quarter, enlarge the description in the grant, or, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity, instead of by the description in the patent.

But, independently of the above view, which we think conclusive against the plaintiff, we are not satisfied that there was any want of power in the surveyor general in making the subdivisons of this section according to the plat, and in conformity with which the sales of the land in dispute were made.

The first section of the act of 24th April, 1820, (U. S. St., p. 566,) after referring to the act of 1805, provides, "that fractional sections containing one hundred and sixty acres or upwards, shall, in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections, containing less than one hundred and sixty acres, shall not be divided, but shall be sold entire."

The Secretary of the Treasury issued his regulations to the surveyor general, through the Commissioner of the Land Office, on the 10th June following, in which he directed that fractional sections containing more than one hundred and sixty acres should be divided into half-quarter sections, by north and south, or east

and west lines, so as to preserve the most compact and convenient forms. The fractional section in question was divided by a north and south line, according to these instructions.

Under them, some latitude of discretion has been exercised by the surveyor general in the division of fractional sections exceeding the quantity mentioned, regard being had to convenient forms, and to avoid the subdivision of the public domain into ill-shaped and unsaleable fractions.

The question, as we have already seen, came again before the Secretary of the Treasury in the case of Etheridge, before us, in 1837, and the construction first given, and also the practice of the surveyor general under it, confirmed. The surveys of the public lands under this regulation had then been in operation for some seventeen years, and has since been continued. Attorney General Butler, upon whose authority the Secretary of the Treasury confirmed the survey of the fractional section in question, in a well considered opinion, observed that, "if Congress had intended that fractional sections should, at all events, be divided into half-quarter sections, when their shape admits the formation of any such subdivision, I think they would have said so in explicit terms, and that the discretionary power entrusted to the secretary would have been plainly confined to the residuary parts of the section; and further, that the clause in the first section of the act of 1820, concerning fractional sections containing less than one hundred and sixty acres, (which are not to be divided at all, but sold entire,) is decisive to show that Congress, which passed the act, did not deem it indispensable that regular half-quarter sections should, in all practicable cases, be formed by the surveyors: on the contrary, it shows that they preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half-quarter, to small, inconvenient fractions." We entirely concur in this construction of the act.

The only difficulty we have had in this case arises from the circumstance that a different opinion was expressed by a majority of this court in the case of *Brown's Lessee* v. *Clements* (3 Howard, p. 650.) That opinion differed from the construction of the act of 1820, given by the head of the land department, and disapproved of the practice that had grown up under it in making the public surveys; and also from the opinion, subsequently confirming this construction and practice, by the Secretary of the Treas-

ury and Attorney General, as late as the year 1837. The decision in *Brown* v. *Clements* was made in the December term, 1844.

It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case, but we are satisfied that far less inconvenience will result from this dissent than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years. Any one familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision, or apply its principles in rendering the judgment of the court in this case.

The judgment of the court below is reversed, and the proceedings remitted to the court, to award a venire, &c.

DE LA FAYETTE WILCOX, plaintiff in error, *v.* JOHN JACKSON, on the demise of MURRAY M'CONNEL, defendant in error.

January Term, 1839.—13 Peters, 498; 13 Curtis, 266.

Assuming that the register and receiver of a land office have a lawful jurisdiction to decide on the facts of a pre-emption claim, if they undertake to grant land, which Congress have declared shall not be granted, their act is void.

The pre-emption act of May 29, 1830, (4 Stats. at Large, 420,) having forbidden entries on land appropriated for any public purpose. *Held*, that the President having, under the authority of Congress, appropriated a tract of public land to the use of a military post, it was within the reservation.

The President acts, in many cases, through the heads of departments and the Secretary of War having directed a section of land to be reserved for military purposes, the court presumed it to have been done by the direction of the President, and held it to be, by law, his act.

Whenever a tract of land has been appropriated to the public use, it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms, except it.

The question, whether a title to a portion of the public lands has passed from the United States, must depend exclusively upon the laws of the United States, when it has passed it then becomes subject to State laws.

The case is stated in the opinion of the court.

Butler and *Grundy* (Attorney General.) for the plaintiff.

Key and *Webster contra.*

BARBOUR, J., delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Illinois, prosecuted under the 25th section (1 Stats. at Large, 85) of the Judiciary Act of 1789.

It was an action of ejectment brought by the defendant in error against the plantiff in error.

From an agreed case stated in the record, the following appear to be the material facts upon which the questions to be decided arise.

The land in question is part of fractional section 10, in township 39, north of range 14, east of the third principal meridian, in the county of Cook, and State of Illinois; and embraces the military post called Fort Dearborn, of which post, at the time of bringing the suit, Wilcox was in possession, as the commanding officer of the United States; which post was established by the United States in 1804, and was thereafter occupied by the troops of the United States until the 16th August, 1812, when the troops were massacred and the post taken by the enemy. It was reoccupied in 1816, when the United States built upon said fractional section some factory houses for the use of the Indian Department.

The troops continued to occupy it until May, 1823, when it was evacuated by order of the government, and was left in possession of the Indian agent at Chicago.

In August, 1828, it was again occupied by the troops, acting under the orders of the Secretary of War, as one of the military posts of the United States. It was again evacuated by the troops in May, 1831;, but the government never gave up possession of it, but left it in possession of one Oliver Newberry, who authorized a certain George Dole to take and keep it in repair, which he accordingly did.

It was again occupied by the troops of the government in June, 1832, under command of an officer of the army of the United States.

It has been occupied by the troops, and was generally known at Chicago to be so occupied, from that time up to the commencement of the suit; and was at the time of the trial still used for that purpose. When it was evacuated in 1831, the quartermaster at the post, acting under orders, sold the greater part of the

movable property in and about the garrison belonging to the government, but sold none of the buildings.

In the year 1817 John B. Beaubean, bought of one John Dean, who was an army contractor at the post, a house built upon the land by Dean, at the price of $1,000; there was attached to the house an enclosure occupied by Dean as a garden and field: Beaubean then took possession of the house and inclosure, and continued in possession, cultivating part of the inclosure every year, from 1817 to 1836.

In 1823, the factory houses on the land at said post were sold by order of the Secretary of the Treasury, which, after an intermediate sale, were bought by Beaubean at $500; who took possession, and continued to occupy the same, together with a part of the quarter-section of land, until the commencement of this suit.

Beaubean continued to occupy the houses and inclosure, and to cultivate a part of the land, without interruption, from 1817 to the commencement of this suit. The land was surveyed by the government in 1821.

Since it was reoccupied by the troops in 1832, and before the 1st of May, 1834, the United States built a lighthouse on part of the land, and have kept at least twenty acres constantly inclosed and cultivated for the use of the garrison. In the year 1824, at the instance of the then Indian agent at Chicago, who suggested that it would be convenient for the accommodation of the persons and protection of the property of the agency, the Secretary of War requested the Commissioner of the General Land Office to direct a reservation to be made for the use of the Indian Department at that post; and in October, 1824, the commissioner answered, saying that he had directed the section now in question to be reserved from sale, for military purposes.

In May, 1831, Beaubean made a claim for pre-emption of the land in question at the land office in Palestine, which was rejected. In February, 1832, in answer to a letter from Beaubean on the subject, the Commissioner of the General Land Office informed him that the land in question was reserved for military purposes.

The same information was given to others who made application in behalf of Beaubean.

In 1834, he made claim for a pre-emption in the same, at the Danville land office, which was also rejected. In 1835, Beaubean applied to the land office at Chicago, when his claim to pre-emp-

tion was allowed; and he paid the purchase-money, and procured the register's certificate thereof.

Wilcox went into and continued in possession, claiming no right of ownership, but as an officer of the United States only, in command of said post, acting under the orders of the Secretary of War, his superior officer, and the United States. Beaubean sold and conveyed his interest to the lessor of the plaintiff.

Upon this state of facts two questions arise which, in our opinion, embrace the whole merits of the case, and which we will now proceed to examine. The first is, whether, under the facts of the case, and the law applying to them, Beaubean acquired any title whatsoever to the land in question?

The second is, whether, if he did acquire any title at all, is it such an one as will enable the lessor of the plaintiff to recover in this action?

As to the first question. The ground of the claim is the right of Beaubean, as a settler to a pre-emption under the act of the 19th June, 1834 (4 Stats. at Large, 678), entitled "An act to revive an act granting pre-emption rights to settlers on the public lands, passed 29th of May, 1830."

Now, as this act gives to the persons claiming under it the benefits and privileges provided by the act of 1830, which it revives, we must look to this last act in order to ascertain what are those benefits and privileges, or, in other words, what is the character of the pre-emption right thus claimed, and on what lands the claim is allowed to operate. It authorizes every settler or occupant of the public lands, under the circumstances therein stated, to enter with the register of the land office in which the land lies, by legal subdivisions, a quantity of land not exceeding a quarter-section, subject to the following limitations and restrictions: "That no entry or sale of any land shall be made under the provisions of the act which shall have been reserved for the use of the United States, or either of the several States, or which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection, which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing.

It is this—that the acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims

to the right of pre-emption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority.

The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al.* v. *Peirsol et al.*, 1 Pet., 340, in these words: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." Now to apply this. Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as if a court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case beyond that sum.

We now return to the inquiry whether the land in question falls within any of the prohibitions contained in the act of Congress.

Amongst others, lands which may have been appropriated for any purpose whatsoever, are exempt from liability to the right of pre-emption.

Now, that the land in question had been appropriated in point of fact, there can be no doubt, for the case agreed states that it has been used from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency, with some occasional interruption.

Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use. But it is said that this appropriation must be made by authority of law.

We think that the appropriation in this case was made by authority of law. As far back as the year 1798, see act of May 3, of that year (1 Stats. at Large, 554), vol. iii. Laws U. S., 46, an appropriation was made for the purpose, amongst other things, of enabling the President of the United States to erect fortifications in such place or places as the public safety should, in his opinion, require. By the act of 21st of April, 1806 (2 *Ib.*, 402), vol. iv. Laws U. S., 64, the President was authorized to establish trading-houses at such posts and places on the frontiers or in the Indian country, on either or both sides of the Mississippi river, as he should judge most convenient for carrying on trade with the Indians.

And by act of June 14, 1809 (3 *Ib.*, 547), he was authorized to erect such fortifications as might, in his opinion, be necessary for the protection of the northern and western frontiers.

We thus see that the establishing trading-houses with the Indian tribes, and the erection of fortifications in the west, are purposes authorized by law, and that they were to be established and erected by the President.

But the place in question is one at which a trading-house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if Congress had, by law, directed the trading-house to be established and the military post erected at Fort Dearborn, by name, that this would have been by authority of law. But, instead of designating the place themselves, they left it to the discretion of the President, which is precisely the same thing in effect. Here, then, is an appropriation, not only for one, but for two purposes, of the same place, by authority of law. But there has been a third appropriation in this case by authority of law. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limit of the land in question, and appropriated $5,000 for its erection; and the case agreed states that the lighthouse was built on part of the land in dispute before the 1st of May, 1834.

We think, then, that there has been an appropriation, not only in fact, but in law.

There would be difficulty in deciding to what extent this appropriation reached, if there were not materials furnished by the record which reduce it to precision. At the request of the Secretary of War, the Commissioner of the General Land Office, in

1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this, too, as having been done by authority of law, for, amongst other provisions in the act of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.

Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made as being, in legal contemplation, the act of the President, and consequently that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress.

It is argued, however, that, by the 4th section (4 Stats. at Large, 687) of the act of the 26th of June, 1834, the President was authorized to cause to be sold all the lands in the northeast district of the State of Illinois, embracing the land in question, with certain reservations only, within which it is contended that the land in question is not included: that a proclamation was issued directing various lands in said district to be sold, and that amongst the lands so proclaimed was the land in question, unless excepted by the following exception: "The lands reserved by law for the use of schools, and for other purposes, will be excluded from the sale." And that an extended plat was forwarded from the General Land Office, marking and coloring certain lands to be reserved from sale; but that the land in question was not so marked or colored to be reserved from sale.

In the first place, we remark that we do not consider this law as applying at all to the case. That has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of pre-emption and governed by different laws. The very act of 19th of June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated. But we go

further, and say that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

The very act which we are now considering will furnish an illustration of this proposition. Thus, in that act, there is expressly reserved from sale the land within that district which had been granted to individuals and the State of Illinois. Now, suppose this reservation had not been made, either in the law, proclamation, or sale, could it be conceived that, if that land were sold at auction, the title of the purchaser would avail against the individuals or State to whom the previous grants had been made? If, as we suppose, this question must be answered in the negative, the same principle will apply to any land which, by authority of law, shall have been severed from the general mass. Let us, for a moment, consider to what results a contrary doctrine would lead, and the case before us will furnish a very striking illustration of them. If the party claiming the pre-emption right here were to succeed, together with the land, he would recover all the improvements made upon it at the public expense. The lighthouse and improvements alone, it seems, by reference to the act making an appropriation for its erection, cost $5,000. How much was expended in the buildings at the military post we have no means of knowing, but probably a considerably larger sum. Thus, besides the land purchased for the sum of $94.61, he would recover property—and that, too, property necessary for the military defence and commerce of the country—which cost the United States many thousands of dollars; and if there had been expended upon it as many hundreds of thousands as there have been thousands the same result would follow. A principle leading to such startling consequences cannot, in our opinion, be a sound one. The right of pre-emption was a bounty extended to settlers and occupants of the public domain. We cannot suppose that this bounty was designed to be extended at the sacrifice of public establishments or great public interests. When the act of 1830 was passed Congress must have known of the authority which had by former laws been given to the President to establish trading-houses and military posts. They must have known, for it was part of the public history of the country, that a military post had been long estab-

lished at Fort Dearborn, and was at the date of the law occupied as such by the troops of the United States. They seem, therefore, to have been studious to use language of so comprehensive a kind in the exemption from the right of pre-emption, as to embrace every description of reservation and appropriation which had been previously made for public purposes.

We have already said that we think the language in which these exemptions are expressed is comprehensive enough to embrace the present case, so as to place it beyond the reach of the right of pre-emption.

It is further argued that this case is embraced by the 2d section of the act of July 2, 1836, (5 Stats. at Large, 73,) entitled "An act to confirm the sales of public lands in certain cases." That section is in these words: "*And be it further enacted*, That in all cases where an entry has been made under the pre-emption laws pursuant to instructions sent to the register and receiver from the Treasury Department, and the proceedings have been in all other respects fair and regular, such entries and sales are hereby confirmed, and patents shall be issued thereon as in other cases." Now, the first remark we make upon this act is, that when the previous law had totally exempted certain lands from the right of pre-emption, if there were nothing else in the case, it would be a very strong, not to say strained, construction of this section to hold that Congress meant thereby, by implication, to repeal the former law in so important a provision. But we are satisfied that there were other cases to which it was intended to apply: where the instructions from the Treasury Department assumed, to say the least, a doubtful, if not an illegal, power. As, for example, the instructions of the 7th February and 17th October, 1831, by which entries were allowed to be made and certificates issued under the act of 1830, which was only in force for one year from its passage after the expiration of the year, where the persons claiming had been deprived of the benefits of the act of 1830 by reason of the township plats not having been furnished by the surveyor general, and where, nevertheless, proofs of the claim had been filed before the expiration of the year. To this case, and others similarly situated, the law may well apply; because, without affecting the general principles of the system, they present instances in which innocent parties would have been injured by the acts or omissions of public officers, or by some other cause, as to which no fault was imputable to them. But, further, the entries

to be saved by this section must have been pursuant to instructions sent to the register and receiver from the Treasury Department.

Now, it not only is not shown that any instructions were so sent, which would authorize this pre-emption; but on the contrary the agreed case shows that the register and receiver, at the Palestine land office, rejected it in 1831: that the Commissioner of the General Land Office, in the same year, in answer to a letter of Beaubean complaining of that rejecting, informed him that the land was reserved for military purposes; and that, in July, 1834, after the passage of the pre-emption law of that year, he applied to the register and receiver of the Danville land office to prove a pre-emption to the same land, who also rejected the application, and again informed him that it was reserved for military purposes. Finally, by the express terms of this section, entries under the pre-emption laws, to be protected by it, must be in all other respects fair and regular. Now, as the patents were to be issued by the Commissioner of the General Land Office, and as they were only to issue where the proceedings were fair and regular, that officer must of necessity be the judge of that fairness and regularity.

But, as he refused to issue the patent, we know not whether he considered the proceedings in this case as being fair and regular. If they were not so, then they were not confirmed. We think, therefore, that the claimant can derive no aid from the act of 1836.

Our conclusion, then, in relation to the first question is, that, under the facts of the case, and the law applying to them, Beaubean acquired no title whatsoever to the land in question.

This being the case, it would not be absolutely necessary to decide the second question: but, as it arises in the case, and has been fully argued, we will bestow upon it a very brief examination. That question is, whether, if he had acquired any title at all, it was such an one as would enable the lessor of the plaintiff below to recover in this action?

Wilcox, the defendant in the original suit, did not claim, or pretend to set up any right or title in himself. He held possession as an officer of the United States; and for them, and under their orders. This being the state of the case, the question which we are now examining, is really this, whether a person holding a register's certificate without a patent, can recover the land as against the United States.

We think it unnecessary to go into a detailed examination of the various acts of Congress, for the purpose of showing what we consider to be true in regard to the public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is, where an act of Congress grants land, as is sometimes done in words of present grant.

But we need not go into these exceptions. The general rule is what we have stated; and it applies as well to pre-emptions as to other purchases of public lands. Thus it will appear, by the very act of 1836, which we have been examining, that patents are to issue in pre-emption cases. This, then, being the case, and this suit having been in effect against the United States, to hold that the party could recover as against them, would be to hold that a party, having an inchoate and imperfect title, could recover against the one in whom resided the perfect title. This, as a general proposition of law, unquestionably cannot be maintained.

But it is argued that a law of the State of Illinois declares, that a register's certificate shall be deemed evidence of title in the party, sufficient to recover possession of the lands described in such certificate, in any action of ejectment or forcible entry and detainer; but the same law declares that this shall be the case, unless a better legal and paramount title be exhibited for the same. Upon the construction of the law itself, it would not apply to this case, because the United States not having parted with a consummate legal title by issuing a patent, a better legal and paramount title was exhibited for the same. Where that was not the case, but the suit should be against any person not having the right of possession, or against a trespasser, these are the kind of cases in which it would seem to us, by the proper construction of the act, that it was intended to operate.

A much stronger ground, however, has been taken in argument. It has been said that the State of Illinois has a right to declare, by law, that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seem to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was

a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that, in such a case as this, a patent is necessary to complete the title.

But, in this case, no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State legislature to say, that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be by force of State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this, that, whenever the question in any court, State or federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.

It was urged at the bar, that the case of *Ross* v. *Doe*, on the demise of Barland and others, in this court, 1 Pet., 655, sustained the ground taken as to the obligatory force of the law of Illinois. A very brief examination of that case will show that it falls greatly short of what it is supposed to decide. That was a conflict between two patentees, both claiming under the United States. The elder patent was founded upon a certificate of the register of the land office west of Pearl river. The junior patent was issued on a certificate of the board of commissioners west of Pearl river. The court below instructed the jury that the junior patent of the plaintiff in ejectment, emanating upon a certificate for a donation claim prior in date to the patent under which the defendant claimed would overreach the elder patent of the defendant, and in point of law, prevail against it.

It appears that, by the mode of proceeding in Mississippi, they look beyond the grant.

This court remarking upon that, said, that in so doing, and in applying their peculiar mode of proceeding to titles derived through and under the laws of the United States, they violated no provisions of any statute of the United States.

But the court then proceeded to say: "The important question in the case is this: in applying its own principles and practice in the action of ejectment, as might well be done in this case, has the court misconstrued the act of Congress in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners west of Pearl river set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment?" They then proceed to examine the various acts of Congress upon the subject; declare their opinion to be, that the determination of the commissioners was final; and come to the conclusion, that the Supreme Court of Mississippi had not misconstrued the acts of Congress from which the rights of the parties were derived; and, consequently affirmed the judgment. Thus it will appear that, in that case, whilst the form and mode of proceeding by the law of Mississippi were recognized, yet the rights of the parties depended exclusively upon the construction of acts of Congress, and that this court thought that the court below had construed them correctly. This case, then affords no countenance whatever to the argument founded upon it.

Upon the whole, we are of opinion that the judgment of the Supreme Court of Illinois is erroneous: it is, therefore, reversed, with costs.

NOTE.—A pre-emption right cannot be acquired to lands certified to the State under an act of Congress, although the lands were not embraced in the grant. *Bellows* v. *Todd*, 34 Iowa, 18; nor to the "Osage Indian" lands, ceded to the United States by treaty of September 29th, 1865, and amendment of January 25th, 1867. *Wood* v. *M. K. and T. R. R. Co.*, 11 Kansas, 323.

MORTON *v.* NEBRASKA.

October Term, 1874.—21 Wallace, 660.

1. The policy of the government, since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the "Louisiana Territory," acquired by us from France in 1803, and probably would apply to the Territory of Nebraska, on general principles. Whether or not, it does apply under the act of July 22d, 1854, "to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska." It applies at least so far as to render void an entry where the salines at the time had been noted on the field-books, were palpable to the eye, and were not first discovered after entry.
2. Patents for land which have been previously reserved from sale are void.
3. Where an act of Congress speaks of "vested rights," protecting them, it means rights lawfully vested. Hence, it does not protect a location made on public land reserved from sale.

ERROR to the Supreme Court of Nebraska.

Morton sued certain tenants of the State of Nebraska in ejectment to recover three hundred and twenty acres of salt land—*salines*—in the said State; a State formed, as every reader of these volumes is aware, out of that vast region formerly known as the Territory of Louisiana, and purchased in 1803 by us from France. The land in question was palpably saline, so incrusted with salt as to resemble snow-covered lakes. The salines in question were noted on the field-books, but these notes were not transferred to the register's general plats. The State intervened in the suit, and by its own request was made a defendant.

The plaintiff based his title under locations of military bounty-land warrants at the land office in Nebraska City, in September, 1859. These warrants were issued by virtue of the Military Bounty-Land Act of September 28th, 1850, which declared that such warrant might be located at any land office of the United States upon any of the public lands in such district *then subject to private entry*.

The locators of the warrants, it appeared, before they made their entries, were told that the lands were salines. The State now set up that the locations were without authority of law, because the lands being saline lands, were not subject to such entry.

The question thus was, whether, in Nebraska, saline lands were open to private entry; or, more strictly, whether they were so under circumstances such as those above stated.

It was not denied by the plaintiff that the practice of the Federal Government, as exhibited by many acts of Congress (which, being referred to in the opinion of the court, need not here, by the reporter, be particularized,) from an early date had been to exclude this sort of land, with certain other sorts, from public sale generally. It had done so confessedly from the Northwestern Territory, and from the Territory of Orleans, the now State of Louisiana. But the defendants conceived—and such was their position—that, under the statutes regulating the matter in *Nebraska*, this was not so. The matter was to be settled by certain acts of Congress, standing, perhaps, by themselves; or, if their language was not clearly enough applicable to the district of Nebraska, by such acts, read by the light of the policy of the government, and its numerous enactments on the main subject.

The first act which bore directly upon the matter was an act of March 3d, 1811, (2 Stat. at Large, 665. § 10.) providing for the final adjustment of claims to lands, and for the sale of the public lands in the Territories of Orleans and Louisiana. This act created a new land district, and authorized the President to sell any surveyed public lands in the Territory of Louisiana, with certain exceptions named:

"And with the exception, also, of the *salt springs* and lead mines, and lands contiguous thereto."

Next came an act approved July 22d, 1854, (10 Stat. at Large, 308,) more immediately bearing on the matter: "An act to establish the offices of Surveyor General of New Mexico, Kansas and *Nebraska*, to grant donations to actual settlers therein, and for other purposes."

This was an act of thirteen sections, and, as its title shows, relating to three different territories.

The first three sections related, without any question, exclusively to the Territory of New Mexico.

The first of them authorized the appointment of a surveyor general for *that* territory, with the usual powers and obligations of such officers.

The second made a donation of a quarter-section of land to all white males residing in *it*, who had declared an intention, prior to January 1st, 1853, to become citizens; and also (on condition of

actual settlement, &c.,) to every white male citizen above twenty-one years of age, who should remove or have removed there between January 1st, 1853, and January 1st, 1858.

The third authorized a patent for *such* land to issue.

Then came in a fourth section, in these words: "*None of the provisions of this act* shall extend to mineral or *school* lands, *salines*, military or other reservations, or lands settled on or occupied for purposes of trade and commerce, and not for agriculture."

This fourth section, as the reader will observe, does not, in terms, refer to the Territory of New Mexico, but says, *none of the provisions of this act*, &c.

However, the fifth section enacts "that sections 16 and 36 in each township shall be, and the same are hereby reserved, for the purpose of being applied to schools in the *said territory*;" that is to say, the Territory of New Mexico; and the sixth reserves a quantity of land equal to two townships, for a university *there*.

The fourth section, therefore, as the reader will have noted, is interposited between sections which relate exclusively to the Territory of New Mexico, though it, itself, does not in terms so exclusively relate. The fifth section, also, as he will have noted, makes a reservation for schools; a matter which the fourth section in some way apparently had also legislated upon. Then came a seventh section, enacting "that any of the lands not taken under the provisions of this act" are subject to the operation of the pre-emption act of 4th September, 1841 (5 Stat. at Large, 456), [an act which by its tenth section authorizes certain persons to enter one hundred and sixty acres at the minimum price, and enacts—

"That no lands on which are situated any *known* salines or mines shall be liable to entry under and by virtue of the provisions of this act."]

Section eight authorizes the surveyor general to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and lands covered thereby are to be reserved from sale.

Section nine gives the Secretary of the Interior power to "issue all needful rules and regulations for fully carrying into effect *the several provisions of this act*."

Then comes for the first time, in a section ten, a *specific* reference to Nebraska. This tenth section authorizes the appointment of surveyors general for Nebraska and Kansas, with the usual

powers and obligations of such officers. It authorizes them to locate their offices at certain places, &c.

The eleventh section directs surveys in the said territories.

The twelfth subjects "all the lands to which the Indian title has been or shall be extinguished within said Territories of Kansas and Nebraska to the operations of the pre-emption act of 4th September, 1841;" the pre-emption act mentioned above in the seventh section. And the thirteenth makes two new land districts, authorizes for these two districts the appointment of registers and receivers, and concludes the statute with an enactment thus:

"And the President is hereby authorized to cause the surveyed lands to be exposed to sale, from time to time, *in the same manner* and upon the same terms *as the other public lands of the United States.*"

Whether, therefore, this section four, interposited as it is between sections relating exclusively to New Mexico, did, notwithstanding its general language, bear on the Territory of Nebraska, was one question raised by the plaintiff in the case, who denied that it did or could. He asserted that it meant "none of the *foregoing* provisions," &c.; that is to say, the provisions in section two about the *donation* of land.

The State, on the other hand, insisting that it did apply to the other two territories mentioned in subsequent sections of the act, asserted also that whether it did or did not was unimportant, since by the twelfth section the lands in Nebraska were subjected to the provisions of the pre-emption act of 1841, which exempted "all *known* salines;" within which class, as it happened, those in question came.

The State, however, relied also on two other acts subsequent to that already set forth, of July 22, 1854. The acts were thus:

1st. An act of the 3d of March, 1857 (11 Stat. at Large, 186), "to establish three additional land districts in the Territory of Nebraska."

This act rearranged the land districts of Nebraska, authorized the appointment of officers for them, and by one section enacted—

"That the President is hereby authorized to cause the public lands in said districts to—with the exception of such as *may have been or may be reserved for other purposes*—be exposed to sale in the same manner as other public lands of the United States."

2d. An act of the 19th of April, 1864 (13 Stat. at Large, 47), "to enable the people of Nebraska to form a constitution and State government, and for the admission of such State into the Union," &c.

This act enacts—

"SECTION 11. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use; the said land to be selected by the governor thereof," &c.

Under this act (after the admission of Nebraska as a State into the Union), its governor made a selection of twelve salt springs, the ones now in question being of the number.

This act, however, contained a proviso, which the plaintiffs conceived covered the present case, and destroyed the value to the State (if it had any) of the main enactment. The proviso was thus:

"*Provided*, That no salt spring or lands, the right whereof is now vested in any individual or individuals, shall, by this act, be granted to said State."

It may here be remarked that the plaintiffs had obtained certificates of entry for the lands in controversy, and patents for them had been issued. The patents were transmitted from the General Land Office at Washington to the local office in Nebraska. Before their delivery, however, the Commissioner of the General Land Office, ascertaining that the lands patented were saline lands, and not agricultural, recalled the patents and canceled the location.

The court below gave judgment for the State. From that judgment the other side brought the case here.

The case was thoroughly well argued by Mr. Montgomery Blair, for the plaintiff in error, and by Messrs. William Lawrence, of Ohio, R. H. Bradford, and E. R. Hoar, contra, for the State or its tenants.

In behalf of the plaintiffs in error (plaintiffs also below), it was argued that the act of July 22d, 1854, though purporting to be one statute, and in form such, was obviously in fact two statutes; the first statute coming *to* the tenth section, and relating exclusively to New Mexico; the other, running from the beginning of that tenth section to the end of the thirteenth, and relating exclusively to Kansas and Nebraska. The case was the case of two separate bills, referring to distinct but cognate subjects, tacked together, and passed through Congress as one statute; a very familiar case in the legislation of Congrsss, or of one bill, where two cognate and distinct subjects were acted on in one bill; one

subject in the first part, and the other in the last. Viewing the statute in this light, the fourth section of the first act could not be made to overlap and cover any portion of the second act.

But, if this were not the obvious history or character of the statute, the language of the fourth section is not the language of "reservation." The word "reserved," or "reservation," does not occur in it. The section was, therefore, to be confined to operating upon what immediately precedes it: that is to say, it was to be read as a prohibition upon the occupancy of the mineral, saline and school lands of New Mexico, by settlers, under the donation clause of the act, contained in section two and three, preceding. New Mexico, in 1854, was a distant, and, agriculturally considered, a sterile territory, though one having very rich mines and salines. The object of Congress was to invite *agricultural* settlers into it. Donations of agricultural lands to such persons were requisite to secure this object, and even such donations hardly secured it.

But donations of the invaluable mineral lands and salines there, were not at all requisite to invite thither the enterprizing miner and salt maker. These persons would go there if they could purchase at private sale, or lease the mines or salines. Congress, therefore, would have been without excuse in giving away *these* mines and salines.

The fourth section is, therefore, not to be regarded as a reservation at all, but as a provision withdrawing mines, salines, and the other sorts of land named in it, from the operation of the donation clauses preceding it.

Any other construction of the section makes the statute tautologous. The section, it will be noted, operates, in whatever way it does operate, on *school* lands as much as on salines. If it is to be taken as a reservation, operating over subsequent parts of the act—a reservation, generally, on school lands—then, as to New Mexico, it makes the identical enactment which is made in the fifth section. This, as to that act, is a *reductio ad absurdum*. While a similar sort of demonstration appears in regard to the territories of Nebraska and Kansas, when you advert to the fact revealed by a reference to the statute book, that a previous act (10 Stat. at Large, 283, 289), the act of *May* 30th, 1854, "to organize the Territories of Nebraska and Kansas," by section sixteen and thirty-four, reserves school lands in almost identical language for *them*. (The language is, in the case of each territory:

"Sections numbered 16 and 36 in each township in said territory, shall be and the same are hereby reserved for the purpose of being applied to schools in said territory.")

The learned counsel argued further, that the proviso in the eleventh section of the act of April 11th, 1864, was a plain recognition of a vested right—one made by its own patent—in the plaintiff.

They argued also that there being no exhibition or evidence of salines apparent in the receiver's general plats, no knowledge of any was properly fixed on the plaintiff, and that the patents having once passed the seals of the General Land Office at Washington, the subsequent revocation was void. The plaintiffs were thus possessed of a legal title, and had a right to recover in ejectment.

MR. JUSTICE DAVIS delivered the opinion of the court.

The policy of the government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform.

The act of 18th May, 1796 (1 Stat. at Large, 464), the first to authorize a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs; and reserves for the future disposal of the United States a well known salt spring on the Scioto river, and every other salt spring which should be discovered.

These reservations were continued by the act of May 10th, 1800 (2 Stat. at Large, 73), which created land districts in Ohio, with registers and receivers, and authorized sales by them: the preceding act having recognized the governor of the Northwest Territory and the Secretary of the Treasury as the agents for the sale of the lands.

And the same policy was observed when provision was made in 1804 for the disposal of the lands in the Indiana Territory (embracing what is now Illinois and Indiana.) (2 Stat. at Large, 277.) It was then declared "that the several salt springs within said territory, with as many contiguous sections to each as shall be deemed necessary by the President, shall be reserved for the further disposal of the United States."

Without referring particularly to the different acts of Congress

on the subject, it is enough to say that all the salines in the Virginia cession were reserved from sale and afterwards granted to the several States embraced in the ceded territory. Congress, in the disposition of the public lands in the Mississippi Territory (2 Stat. at Large, 548; 3 Stat. at Large, 489), and in the Louisiana purchase, preserved the policy which it had applied to the country obtained from Virginia. Over all the territory acquired from France the general land system was extended. The same rules which were prescribed by law for the survey and sale of lands east of the Mississippi River were transferred to this new acquisition. (2 Stat. at Large, 324.)

At the first sale of lands in this region which the President was authorized to make, salt springs and lands contiguous thereto were excepted. (2 Stat. at Large, 391.) And this exception was continued when, in 1811, a new land district was created. Prior to this time no portion of the country north of the State of Louisiana had been brought into market.

The act of March 3d, 1811, authorized this to be done, but the President, in offering the lands for sale, was directed to except salt springs, lead mines, and lands contiguous thereto, which were reserved for the future disposal of the States to be carved out of this immense territory, which included the present State of Nebraska. (2 Stat. at Large, 665, § 10.) And so particular was Congress not to depart from this policy, that in giving lands, in 1815, to the sufferers by the New Madrid earthquake, every lead mine and salt spring were excluded from location. Indeed, in all the acts creating new land districts in the territory now occupied by the State of Arkansas and Missouri, the manner of selling the public lands is not changed, nor is a sale of salines in any instance authorized. On the contrary, they incorporate the same reservations and exceptions which are contained in the act of March 3d, 1811. In all of them the act of 18th May, 1796, is the rule of conduct for all surveyors general and their deputies, as the act of 10th May, 1800, is the rule for all registers, requiring them to exclude from sale all salt springs, with the sections containing them.

In this state of the law of saline reservations the act of 22d July, 1854, was passed. It is by no means certain that the act of March 3d, 1811, did not work the reservation of every saline in the Louisiana purchase; but without discussing this point, it is enough to say that the act of 1854 leaves no doubt of the inten-

tion of Congress to extend to the territory embraced by the States of Kansas and Nebraska the same system that had been applied to the rest of the Louisiana purchase. There was certainly no reason why a long established policy which had permeated the land system of the country should be abandoned; on the contrary, there was every inducement to continue for the benefit of the States thereafter to be organized the policy which had prevailed since the first settlement of the Northwestern Territory. In the admission of Ohio and other States Congress had made liberal grants of land, including the salt springs. This it was enabled to do by reserving these springs from sale. Without this reservation it is plain to be seen there would have been no springs to give away, for every valuable saline deposit would have been purchased as soon as it was offered for sale. An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value cannot be imputed to Congress unless the law on the subject admits of no other construction.

But the law of 1854 (10 Stat. at Large, 308), instead of manifesting an intention to abandon this policy, shows a purpose to continue it. It was the first law under which lands were surveyed in Nebraska, offered at public sale, and so made subject to private sale by entry. By it surveyors general for New Mexico and for Kansas and Nebraska were appointed, with the usual powers and duties of such officers; and, although there are provisions relating to New Mexico applicable to that territory alone, yet the leading purpose of this act was to bring into market as soon as practicable the lands of the United States in all of these territories. In New Mexico this could not be done as soon as in Kansas or Nebraska, on account of the policy adopted of donations to actual settlers who should remove there before the 1st of January, 1858, and because of the necessity of segregating the Spanish and Mexican claims from the mass of the public domain. For this reason, doubtless, local land offices were not created in New Mexico, but they were in Kansas and Nebraska, and registers and receivers appointed, with the powers and duties of similar officers in other land offices of the United States; and the President was authorized to cause the lands when surveyed to be exposed to sale, from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States. If there were no other provisions in the law than we have enumerated, we should hesitate to say, in view of the limitation on sales pre-

scribed by law wherever public lands had been offered for sale. that they did not of themselves work a reservation of the land in controversy. In conducting the public sales the register always reserved salines, as it was his duty to do, when marked on the plats, and this was never omitted except by the neglect of the surveyors general or their deputies. But the fourth section of the act removes all doubt upon that subject. That section declares that none of the provisions of this act shall extent to mineral or school lands, salines, military or other reservations, or lands settled on or occupied for purposes of trade and commerce.

It is contended that this section applies to the donations conceded in the preceding sections to actual settlers in New Mexico. But why make this restriction? To do it would require the importation of the word (foregoing), so that the section would read, none of the (foregoing) provisions shall extend to salines or mineral lands. There is no authority to make this importation, and in this way subtract from the general words of the section. The language of the section is imperative, and leaves no room for construction. Besides, why should an intention be imputed to Congress to exclude actual settlers from saline lands but leave them open to private entry by speculators? The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them and in favor of a class of persons whose interests Congress has never been swift to promote. Apart from this, however, the purpose which Congress had in view is to be found in the unbroken line of policy in reference to saline reservations from 1796 to the date of this act. To perpetuate this policy and apply it equally to all the lands of the three territories was the controlling consideration for the incorporation of the section, and, although the words of the section are loose and general, their meaning is plain enough when taken in connection with the previous legislation on the subject of salines. It cannot be supposed, without an expressed declaration to that effect, that Congress intended to permit the sale of salines in territories soon to be organized into States, and thus subvert a long-established policy by which it had been governed in similar cases. If anything were needed to show that the fourth section did reserve salines from sales, it can be found in the act 3d of March, 1857 (11 Stat. at Large, 186), rearranging the land districts in Nebraska. This act excepts from sale such lands "as may have been reserved." This is a declara-

tion that lands had been reserved, and obviously it is a legislative construction of the fourth section of the act of 1854, for nowhere else, except by implication, had there been reservations of any sort in the Territory of Nebraska.

Besides this, the Nebraska enabling act of April 10th, 1864 (13 Stat. at Large, 47), affords still further evidence that the act of 1854 was intended to reserve salines. The purpose of reserving them was to preserve them for the use of the future States, and no State had been organized without a grant of salt springs. In some of the States, the grant was of all within their boundaries, but, on the admission of Missouri, and since, the number was limited to twelve. This number, with a certain quantity of contiguous lands, were granted to Nebraska on her admission. In doing this, Congress must have assumed that the springs had been reserved from sale, for, if this had not been done, the presumption is, there would have been nothing for the grant to operate upon.

It may be true that lands only fit for agriculture will remain a long time unentered, but this would never be the case with lands whose surface was covered over with salt. It would be an idle thing to make a grant of such lands, if there had been a previous right of entry conceded to individuals. This was in the mind of Congress, and induced the reservation in the act of 1854, by means of which Nebraska could be placed on an equal footing with other States in like situation.

But it is said that the locations in question are ratified by the proviso to the section granting the salt springs. This proviso was as follows: "Provided, that no salt spring or lands, *the right whereof is now vested in any individual* or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall, by this act, be granted to said State."

This provision, with an unimportant change in phraseology, was first introduced into the enabling act for Missouri (3 Stat. at Large, 547, § 6), and exactly similar provisions with the one in question were inserted in the acts relating to Arkansas and Kansas. (5 Stat. at Large, 58; 12 Stat. at Large, 126.) The real purpose of the proviso is to be found in the situation of the country embraced in the Louisiana purchase. The treaty of Paris, of April 30th, 1803, by which the "province of Louisiana" was acquired, stipulated for the protection of private property. This comprehended titles which were complete, as well as those

awaiting completion (*Soulard* v. *United States*, 4 Peters, 511), and Congress adopted the appropriate means for ascertaining and confirming them. They were numerous, and of various grades, and covered town sites and every species of land. In Missouri, as the records of this court show, they were quite extensive, and when she was admitted into the Union many of these titles were perfect, and still a large number imperfect. In this condition of things, Congress thought proper, in granting the salt springs to the State, to say that no salt springs, *the right whereof now is* or shall be confirmed or adjudged to any individual, shall pass under the grant to the State. Whether this legislation was necessary to save salt springs claimed under the French treaty, it is not important to determine, but manifestly it had this purpose in view, and nothing more. It could not refer to salt springs not thus claimed, because all entry upon them was unlawful on account of previous reservation. It speaks of confirmations which had been made, and those which were awaiting governmental action, and in this condition were all the titles the United States were bound to protect.

Although the words employed in the first division of the proviso to the saline grant to Nebraska are not the same as those used in the Missouri grant, they mean the same thing. There can be no difference between a right which has been confirmed and one which is now vested. Both are perfect in themselves, and refer to completed claims, while the last division in each proviso has reference to claims in course of completion but not finally passed upon. This proviso can have little significance in the enabling act of Nebraska, nor indeed in many other enabling acts, but Congress doubtless thought proper to introduce it out of the superabundance of caution, as there could be no certainty that in purchased or conquered territory, however remote from settlement, there might not be private claims protected by treaty stipulations to which it would be applicable. It cannot be invoked, however, for the protection of these plaintiffs. When a vested right is spoken of in a statute, it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or entry. If Congress had intended to ratify invalid entries like these, they would have used the language of ratification. Instead of doing this, the language actually employed negatives any idea that Congress intended to give validity to any unauthorized location on the public lands.

The pre-emption act of the 4th of September, 1841 (5 Stat. at Large, 456), declares that "no lands on which are situated *any known* salines or mines shall be liable to entry;" differing in this respect from the acts of 1796 and 1854, which reserve every "salt spring" and "saline." The salines in the case were not hidden as mines often are, but were so incrusted with salt that they resembled "snow-covered lakes," and were consequently not subject to pre-emption. Can it be supposed that a privilege denied to pre-emptors in Nebraska was conceded in the act of 1864 to persons less meritorious?

It appears by the record, that on the survey of the Nebraska country, the salines in question were noted on the field-books, but these notes were not transmitted to the register's general plats, and it is argued that the failure to do this gave a right of entry. But not so, for the words of the statute are general and reserve from sale or location *all* salines, whether marked on the plats or not.

What effect the statute might have on salines hidden in the earth, not known to the surveyor or the locator, but discovered after entry, may become a question in another case. It does not arise in this. Here, the salines were not only noted on the field-books, but were palpable to the eye. Besides this, the locators of the warrants, before they made their entries, were told of the character of the lands. Indeed it is quite clear that the lands were entered solely on account of the rich deposits of salt which they were supposed to contain.

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. (*Polk* v. *Wendell*, 9 Cranch, 99; *Minter* v. *Crommelin*, 18 Howard, 88; *Reichart* v. *Felps*, 6 Wallace, 160. The executive officers have no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law. (*Minter* v. *Crommelin*, *supra*.)

Judgment affirmed.

ALTON R. EASTON, plaintiff in error, *v.* THOMAS L. SALISBURY.

December Term, 1858.—21 Howard, 426; 3 Miller, 72.

Missouri Land Law—Spanish Grants.

1. The United States, by various acts of Congress, reserved from sale or other disposition, lands to which claims had been set up under Spanish and French grants in the Louisiana purchase; but from the years 1829 to 1832, these reservation acts were annulled or inoperative. In 1836, the concession under which defendant held or claimed, was confirmed by an act of Congress. Held, that a location by plaintiff of a New Madrid certificate on this land in 1818, and a patent issued thereon in 1827, were void, because at both these dates it was reserved by act of Congress, and the action of the land officers was without authority.
2. That the failure to renew or keep alive this reservation from 1829 to 1832, did not make valid the title of Easton, which was void before.

WRIT of error to the Supreme Court of Missouri. The case is stated in the opinion.

Mr. Gibson and *Mr. Gamble* for plaintiff in error: *Mr. Ewing* for defendant.

MR. JUSTICE MCLEAN delivered the opinion of the court.

This was a writ of error to the Supreme Court of the State of Missouri..

The parties agreed as to the facts in this case, in order that the points of law might be ruled by the court.

On the 9th of July, 1811, there were confirmed to James Smith, by the commissioners for the adjustment of titles to land in the Territory of Missouri, lots nine and ten (9 and 10), containing two arpens of land, in the village of Little Prairie, in the county of New Madrid, State of Missouri. Afterwards these lots, while still owned by said Smith, were materially injured by earthquakes, and proof thereof was made before the recorder of land titles at St. Louis, on the 16th of November, 1815; whereupon, there was issued by said recorder, to said James Smith, a certificate of new location (commonly called a New Madrid certificate), numbered 159. On the 22d of October, 1816, said Smith and wife conveyed to Rufus Easton the said two arpens in Little Prairie, and assigned to him the right to locate other lands under said certificate in lieu of the land so injured, and also conveyed to said Easton the land that might be located by means of said certificate. On the 16th of November, 1816, Easton gave notice to the Surveyor General of said Territory of Missouri of the loca-

ton of said certificate on a tract of land about two miles west of the city of St. Louis, and demanded a survey thereof. In March, 1818, a survey was made, by direction of the surveyor general, in pursuance of said selection, and was duly returned and approved by said surveyor general; said survey is numbered 2,491, and the land thereby designated embraces the land in controversy, and is within St. Louis township, in St. Louis county, Mo. By virtue of the premises, Easton held said land, claiming the same until 1826, when he conveyed the same to William Russell. On the 28th day of May, 1827, the United States issued a patent on said location for said land to James Smith, or his legal representatives. On the 19th of January, 1839, William assigned and conveyed all his interest in said land to J. G. Easton, who, on the 18th of March, 1845, conveyed and assigned the same to plaintiff. Defendant is in possession of the land described in the petition, and the same is within the boundaries indicated by said survey and patent.

On the 20th of January, 1800, a concession was made by the Spanish lieutenant governor to one Mordecai Bell, of three hundred and fifty arpens of land, including the premises in controversy. The representatives of Mordecai Bell, on the 29th of June, 1808, presented the claim for said land, together with a descriptive plat of survey thereof, to the board of commissioners for the adjustment of land titles in the Territory of Missouri. The documents showing said claim, and the derivative title from Mordecai Bell, were duly recorded in 1808, by the recorder of land titles for the Territory of Missouri. And on the 4th day of July, 1836, the United States confirmed said claim, according to said plat of survey, to the legal representatives of M. Bell: a survey of said confirmation was made by authority of the United States in ——, and is numbered 3,026. Said survey embraces the land in dispute: and all the title of the confirmee, by the act of 1836, is in the defendant. The survey numbered 2,491, and also the patent dated 28th of May, 1827, are in due form of law: but defendant does not admit the authority of the officers of the United States to make the one or issue the other, nor that the same were made or issued under any law. It is admitted that the land in controversy is worth more than two thousand dollars; that if the court should be of opinion that the plaintiff is entitled to recover, it is agreed that the damages shall be fixed at one cent, and the monthly value of the premises at one dollar.

Either party is at liberty to turn this case into a bill of exceptions, and thereon prosecute a writ of error, or take an appeal to the Supreme Court of the State of Missouri, or of the United States. It is admitted that survey No. 3,026 was made under the authority of the United States, but the plaintiff may dispute the power of the United States as regards both the confirmation of 1836 and the survey No. 3,026.

It is admitted that the plaintiff had, at the commencement of this suit, all the title that was invested in said James Smith, or his representatives, by the New Madrid location and patent above mentioned.

It will be observed that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and the 28th of May, 1827, the United States issued a patent to James Smith, or his legal representatives.

From 1808 to the 26th of May, 1829, reservations were made, from time to time, to satisfy certain claims, but from that time they ceased, until renewed by the act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right, during this time, to perfect his title."

The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of *Stoddard* v. *Chambers*, (2 How., 318), it is said: "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested.

Nothing was done to give Easton's title validity, from the cessation of the reservation, in 1829, until its revival in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented, having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might have been procured, or a new one

instituted, it is not necessary to inquire. No such attempt was made.

But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 15th of February, 1815, which shall not be located within one year, shall be held null and void.

This law is decisive upon this point: all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836. Bell made the conveyance to Mackey, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured, by way of estoppel, to the grantee, and those who claim by deed under him. (*Stoddard v. Chambers*, 2 How., 317.)

There was no period from the entry and patent of the New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmee, or to the New Madrid title asserted against it, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.

NOTE.—A New Madrid certificate could not be located on the Hot Springs Reservation in Arkansas. *The Hot Springs Cases*, 2 Otto, 698.

VAN REYNEGAN *v.* BOLTON.

October Term, 1877.—5 Otto, 33.

1. Under the Mexican law, when a grant of land is made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage is essential to the complete investiture of title. This proceeding, called in the language of the country, the delivery of juridical possession, involves the establishment of the boundaries of the land granted when there is any uncertainty with respect to them. A record of the proceeding is preserved by the magistrate, and a copy delivered to the grantee.

2. Unless the decree of the tribunals of the United States, confirming a claim under such a grant, otherwise limits the extent or the form of the tract, the boundaries thus established should control the officers of the United States in surveying the land.
3. A survey, by a surveyor general of the United States, of a claim thus confirmed, is inoperative, until finally approved by the Land Department at Washington.
4. Where a quantity of land in California was granted by the Mexican government within a tract embracing a larger amount, in the possession of which tract the grantee was placed, he is entitled to retain such possession until that quantity is segregated from the tract by the officers of the government and set apart to him; he may maintain ejectment for the whole tract, or any portion of it, against parties in possession claiming under the pre-emption laws of the United States.
5. Lands claimed under Mexican grants in California are excluded from settlement under the pre-emption laws, so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Submitted on printed arguments by the plaintiffs in error, and by *Mr. B. S. Brooks* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an act of ejectment for the possession of a tract of land situated in the county of Marin, in the State of California. The plaintiff traces title to the demanded premises from the Mexican government through a grant made to one John Reed, in 1834; and confirmed by the tribunals of the United States. The defendants, against whom judgment was recovered, held separate parcels of the premises, claiming to be rightfully in possession under the pre-emption laws of the United States.

It appears from the findings of the court that in 1834 the Mexican governor of California, Jose Figueroa, granted to Reed a tract of land known as Corte Madera del Presidio, bounded by the mission of San Rafael and the port of San Francisco, the quantity being specified in the grant as "one square league, a little more or less, as explained by the map attached to the proceedings" (expediente.) In the following year possession of the tract was delivered to the grantee by the proper Mexican officials, and from that time he continued in its possession and enjoyment

until his death. The demanded premises are a parcel of this tract. In 1852 the heirs of Reed presented their claim under the grant for confirmation to the Board of Land Commissioners for the settlement of land titles in California, created by the act of March 3, 1851, and in 1854, by a decree of the board, the claim was confirmed. On appeal to the district court this decree was affirmed. No further proceedings appear to have been prosecuted by the government, and the confirmation thus became final.

The grant is not set forth in the record, but we must presume that it was in the ordinary form of grants made by former governors of California, under the Mexican colonization law of 1824, as under no other law were those governors empowered to make grants of the public domain. Those grants were sometimes of tracts designated by well-defined boundaries, sometimes of a specified quantity of land, lying within exterior boundaries, embracing a greater amount, and sometimes of places by name, where these were well known, and thus capable of ready identification. All of them were made subject to the approval of the assembly of the department, and until they received such approval the estate granted was liable to be defeated. And when the approval was obtained, there was another proceeding to be taken which was essential to the complete investiture of title, and that was a formal delivery of possession of the property by a magistrate of the vicinage, called in the language of the country the delivery of juridical possession. This proceeding involved the establishment of the boundaries of the tract when there was any uncertainty respecting them: if these were designated in the grant, it required their ascertainment and identification; if they were not thus designated, it required the measurement of the quantity granted and its segregation from the public domain. The regulations prescribed by law for the guidance of the magistrate in these matters made it his duty to preserve a record of the various steps taken in the proceeding, to have the same attested by the assisting witnesses, and to deliver an authentic copy to the grantee.

Ordinarily the boundaries thus established would be accepted as conclusive by our government. Unless there is something in the decree of confirmation otherwise limiting the extent or the form of the tract, they should control the officers of the United States in making their surveys. It was so held by this court in *Graham* v. *United States*, 4 Wallace, 259, and in *Pico* v. *United States*, 5 Wallace, 536.

In the case at bar, the surveyor general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about fifteen hundred acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That is a question which must in the first instance be determined by the land department in carrying the decree into execution by a survey and patent. It is sufficient for the present case that the survey made was contested by the confirmees, and the contest was undetermined when this action was tried. Until finally approved, the survey could not impair their right to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then it was inoperative for any purpose. Even if the limitation to one square league should ultimately be held correct, that square league might be located in a different portion of the tract by direction of the land department, to which the supervision and correction of surveys of private land claims are entrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation the confirmees were interested in preserving the entire tract from waste and injury and in improving it, for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole.

No third person could be permitted to determine in advance of such segregation that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. If one person could in this way appropriate a particular parcel to himself, all persons could do so, and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantee, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they

would be excluded from the entire tract. (*Cornwell* v. *Culver*, 16 Cal., 429; *Reily* v. *Heish*, 18 *Id.*, 198; *Mahoney* v. *Van Winkle*, 21 *Id.*, 552.)

The defendants acquired no rights as pre-emptioners under the laws of the United States. Lands claimed under Mexican grants in California are restricted from settlement so long as the claims of the grantees remain undetermined. (10 Stat., 246.) Their possession, therefore, was that of simple intruders and trespassers without color of right. (For the final decision of the Land Department upon the survey made, see Copp's Public Land Laws, 534–540.) *Judgment affirmed.*

NOTE.—Upon a private land claim being finally rejected under the act of March 3, 1851, the land became subject to pre-emption entry from the date of such rejection without being restored in any manner by the commissioner. *Rush* v. *Casey*, 39 Cal., 339; *McGary* v. *Hastings*, 39 Cal., 360.

CHOTARD AND OTHERS *v.* POPE AND ANOTHER.

January Term, 1827.—12 Wheaton, 586; 7 Curtis, 376.

An authority "to enter" a certain quantity of land does not authorize a location on lands previously appropriated or withdrawn from the lands offered from sale.

This cause was argued by *Livingston* and *Webster* for the plaintiffs, and by the *Attorney General* and *Sampson* for the defendants.

JOHNSON, J., delivered the opinion of the court.

The rights of the complainants in the land in litigation in this cause depend upon the construction of the act of Congress of May 8, 1820 (6 Stats. at Large, 246), passed for the relief of the legal representatives of Henry Willis. The words of the act under which the complainants suppose themselves entitled to relief are these: "That the legal representatives of Henry Willis be, and they are hereby, authorized to enter, without payment, in lieu, &c., in any land office, &c., in the States of Mississippi or Alabama, &c., a quantity of land not exceeding thirteen hundred acres, &c."

Under the operation of these words, assuming the right to appropriate any unpatented land in the two States, the complainants

have asserted the privilege of entering a tract of land which covers the site surveyed and laid off for the town of Claiborne, in the State of Alabama. The proper officers have refused to issue the ordinary evidences of title, and have gone on to sell out the town lots according to law. This bill is filed against the register of the land office, and the purchaser of one of the town lots, to compel them to make titles to complainants.

On behalf of the United States it is contended that the literal meaning of the terms of the act is limited and restrained by the context, and by considerations arising out of the general system of land laws of the United States into which this act is ingrafted: and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale.

And such is the opinion of this court. That the legislature had distinctly in view its general provisions for disposing of the unappropriated lands of the United States is distinctly shown in every line of the act under consideration. First, the party is referred to the land office to make his entry; he is then confined to the locations designated by the surveys made by the United States. After which it goes on to enact that "the register or registers of the land offices aforesaid shall issue the necessary certificate or certificates, on the return of which to the General Land Office a patent or patents shall issue." Here the whole organization of the land office is brought into review: and if, then, the term "enter" can be shown to be restricted and confined in its application to a particular class or description of lands, it will follow that when used in laws relating to the appropriation of lands it must lose its general and original signification, and be confined to what may be called its technical or legislative meaning.

The term entry, as applied to appropriations of land, was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the titles to western lands were drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and

corresponding very much in his functions with the registers of land offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States, and by reference to those laws we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States at private sale.

It is familiarly known that the public lands are uniformly brought into market in pursuance of a system which commenced in the year 1796, and was perfected about the year 1800. The lands are first surveyed, then advertised at public auction, and then whatever remains unsold at public auction is offered at private sale to the first applicant at stipulated prices. The act of 1800 presents a full view of the course pursued on this subject, and the 7th section, 2 Stats. at Large, 75 (vol. 3, p. 388) of that act distinctly shows that the right to enter lands is confined to those lands which are offered at private sale. The words enter, entry, and book of entries will be found in that section all used, and exclusively used with reference to the appropriation of lands of that description. Now, no one ever imagined that, under the general system, the right of appropriation by entry in the register's office extended to any appropriated lands, however those appropriations were legally made. The ideas on this subject were so fixed in familiar use that Congress felt no necessity for further precaution in legislating on this subject in this instance, than what is implied in the use of language belonging to their general system.

By looking through the laws making provisions for grants of land from the year 1800 downwards, Congress will be found repeatedly using the term entry in a sense which leaves no doubt of the description of lands to which it is applied. In the act of the 3d March, 1817, 3 Stats. at Large, 390 (vol. 6, p. 286), entitled an act allowing further time for entering donation rights to lands in the district of Detroit, it will be found by comparing the title with the enacting clause that the sense in which the term entry is used is that of filing a claim with the register of the land office. But all the previous laws on the subject show that the only lands that could be appropriated by filing a claim in the register's office were those which were offered at private sale. In the act of March, 1818, 6 Stats. at Large, 200 (vol. 6, p. 260) for "authorizing certain purchasers of public lands to withdraw their entries and transfer the moneys paid thereon," we find Congress familiarly using the

term with reference to the same subject, and still more explicitly in the act of March, 1819, (3 Stats. at Large, 526,) entitled an act providing for the correction of errors in making entries of lands at the land offices (vol. 6, p. 427), until finally, in the year 1820, the very legislature which passed this act in favor of the heirs of Willis has furnished such explicit evidence of the meaning which they attach to the grant of a right to enter as banishes every doubt.

In the 2d and 3d sections of the act of April 24, 1820, 3 Stats. at Large, 566, (vol. 6, p. 486), entitled, "an act making further provisions for the sale of public lands," will be found conclusive evidence that the right to enter is identified with the right to purchase at private sale, and confined to the appropriating of such lands as may be legally appropriated by entry at the register's office; from which are excluded all lands previously appropriated, whether by public sale, or by being withdrawn from the mass of lands offered for sale.

From the earliest date of the legislation of Congress on this subject, there have been appropriations to the public use, made by withdrawing from this mass certain portions of territory for public seminaries, towns, salt springs, mines, and other objects; and the particular land in controversy was appropriated under a previous law, to wit, the act of April, 1820, for the site of a town. We therefore think that it was not included in the right to appropriate vested in the complainants under the act on which they rely.

Before dismissing this subject, it may be proper to remark that the question considered is the only question that was made in argument. The court have also under consideration some points arising on the form of the remedy, and the state of the complainant's right; on which subjects the court are to be considered as uncommitted by any inference that may be drawn from their having disposed of the cause upon the principal question.

Decree affirmed, with costs.

ELDRED v. SEXTON.

October Term, 1873.—19 Wallace, 189.

The fundamental principle established by the act of Congress of April 24th, 1820, and since governing the matter of sales of the public lands, that private entries are not permitted until after the lands have been exposed to public auction at the price for which they are

afterwards sold, *held* to be applicable to a case—that of the grant by Congress, June 3d, 1856, of alternate sections, designated by odd numbers, to the State of Wisconsin, for the aid of the Chicago and Northwestern Railway.

There, after the line of the railroad was located, and the price of sections within six miles designated by even numbers, doubled, that is to say, fixed at $2.50 per acre, and after these were offered at public sale at *that* price, and remained unsold, so that thenceforth they became open to private entry at $2.50, but not at less, the line of the road was changed by joint resolution of Congress, leaving *outside* of the six miles limits certain of these even sections; the joint resolution providing that the even sections of public lands "reserved to the United States by the act of June 3d, 1856 (the original grant), along the originally located route of railroad, and along *which no railroad has been constructed, shall hereafter be sold at $1.25 per acre.*"

Held, notwithstanding this provision, that the "fundamental principle" above spoken of, was of so pervading a character, that, although these sections, while within the six miles limit, had been offered at public sale at $2.50, and refused, they were not open to private entry now that by the change of location they were without that limit, until they had been offered for public sale at $1.25 per acre, and had been left unsold.

ERROR to the Supreme Court of Wisconsin, the case being thus:

An act of Congress, approved April 24th, 1820 (3 Stat. at Large, 566), laid down the following general law about the public lands:

"The price at which the public lands shall be offered for sale shall be $1.25 an acre, and at every public sale the highest bidder, who shall make payment as aforesaid, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than $1.25 an acre; and all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at $1.25 an acre, to be paid at the time of making such entry as aforesaid," &c.

This statute being in force as the general regulation about public lands, Congress, by an act of June 3d, 1856 (11 Stat. at Large, 20), in order to aid the construction of a line of railroad from Fond du Lac, at the south end of Lake Winnebago, in the State of Wisconsin, northerly to the north line of the said State

granted to the said State of Wisconsin every alternate section of land designated by odd numbers, for six sections in width, on each side of the road. In pursuance of a well settled policy of the government on the subject, the price of the even numbered sections remaining to the United States was doubled, and the act declared:

"Nor shall any of said lands become subject to private entry until the same shall have first been offered at public sale, at the increased price."

This land-grant by the legislature of Wisconsin, became vested in the Chicago and Northwestern Railway Company, which had, before the 3d of May, 1859, located the line of its road, so that certain lands, the subject of the controversy in this case, were within the prescribed limits. Up to that day they had never been brought into market, but, upon that day, by proclamation of the President, they were offered for sale at $2.50 per acre. Not being sold, they remained subject to private entry at that sum. A change in the route of the road being desirable, Congress was asked to authorize it, and this was done by the joint resolution of April 25th, 1862. (12 Stat. at Large, 618.)

The first section of the resolution authorized a change of the location of the line of the railroad.

The third and fourth sections of the resolution were thus:

"SECTION 3. The Secretary of the Interior is hereby authorized to cause all even sections or parts of even sections of public land that may be brought within six miles of the new line of railroad, to be sold at the same price and in the same manner as those have been upon the originally located route. And all purchasers, or their heirs or assigns, within the six mile limits of the said originally located route, who shall be more than six miles from the new line, and who have paid the sum of $2.50 an acre, shall have the right either to exchange their locations upon the line as first established, to the new line, upon the same terms, in like quantities, and in the same manner as on the line first established; or, at their option, to enter, without further payment, anywhere within the Menasha land district, in the State of Wisconsin, an additional quantity of public lands subject to private entry, at $1.25 an acre, equal to the quantity entered by them at $2.50 an acre, so that the lands originally entered by them shall *thus* be reduced to the rate of $1.25 an acre.

"SECTION 4. The even sections of public lands reserved to the United States by the aforesaid act of June 3d, 1856, along the originally located route of railroad, north of the said town of Appleton, and along which no railroad has been constructed, *shall hereafter be sold at* $1.25 *an acre*."

A change in the route of the road was made which left the

lands now in question outside of the new limits. After this, but before any public offer of the lands for sale at the reduced price, one Eldred applied to the register and receiver of the local land office, and in 1865 and 1866 was allowed to enter them at the price of $1.25 per acre. The entries, however, were subsequently canceled by the Commissioner of the General Land Office, on the ground that when they were made the lands were not subject to private entry at such minimum price; and this decision, on appeal, was affirmed by the Secretary of the Interior. On the cancellation of the entries the lands were offered at public sale at the minimum price of $1.25 an acre, and not being sold were subsequently purchased at private entry at that price by one Sexton, to whom patents were issued in 1870. Hereupon Eldred filed a bill in one of the State courts of Wisconsin to have Sexton declared a trustee for him, and to have a surrender of the patents, and conveyance of all Sexton's rights to him.

The court decreed against the complainant, and that decree being affirmed in the Supreme Court of the State, the case was brought here by him for review.

The sole question was whether the action as above stated of the Commissioner of the General Land Office and of the Secretary of the Interior was correct. If correct, it was conceded that the defendant's title obtained subsequently could not be impeached. If incorrect, the defendant was to be treated as a trustee holding the legal title for the plaintiff. The solution of the question depended, of course, upon the effect to be given to the land-grant legislation already quoted for the benefit of Wisconsin.

Mr. J. P. C. Cottrill for the plaintiff in error.

When and how the public lands shall become subject to private entry at the minimum price does not depend upon any mere practice of the land department of the government, or upon the "say so" of the public servants who administer that department, but depends upon the enactments of Congress; and when these enactments have been complied with so that the public lands once become subject to private entry they remain so, unless their condition is again changed by force of law. There is no discretionary power reposed in the officers of the land department by which they can say that certain lands shall be in the market subject to private entry to-day and that to-morrow they shall not be.

Now, confessedly, at the close of the offer of them at public sale on the 3d of May, 1859, these lands became and remained

subject to private entry at the price of $2.50; and they were thus subject to private entry, of course, at *that* price when Congress passed its explanatory resolution. Now, what does that resolution say? Simply that "they *shall* be sold at $1.25 per acre." Congress of course knew that the even sections within the six-miles limit were in the market subject to entry at $2.50 an acre: and, having this knowledge before them, it is but respectful to that body to infer that if it had been their intention to withdraw these lands from market and not to subject them to private entry until they had again been offered at public sale at the minimum of $1.25 per acre, they would have expressed such intention in clear terms.

In the second section of the land grant act of June 3d, 1856, they did not leave it a matter of doubt or construction as to whether the even sections within the six-mile limits of the grant should become subject to private entry, by being first offered at public sale at the ordinary minimum price of $1.25 per acre, as provided by the general law, but expressly enacted that they should first be offered at public sale at the increased price.

The only change, therefore, produced upon these lands by the joint resolution was, we submit, to reduce their price from $2.50 to $1.25 per acre. In other respects they stood in the same condition and situation to which they had been brought by the force of other laws and the acts of the officers and agents of the government under those laws.

Suppose that prior to the passage of the resolution, and while the line remained unchanged, and while the even sections within six miles of that line were in the market subject to private entry at $2.50 per acre, a person had entered a quarter-section of land, and paid therefor $2.50 per acre. Now if, after the passage of the resolution and the re-location of the line, this quarter-section was not within the six miles of the new line, the person would, under the third section of the resolution, be entitled to enter another quarter-section at $1.25 per acre. Now, suppose that he actually entered the additional quarter-section, what would be the practical result of the transaction in reference to the first entry? Certainly that the first quarter-section, by virtue of the operation of the explanatory resolution, was in effect entered at private entry at $1.25 per acre.

The theory of the government in this land-grant legislation has been, and is, that public lands within six miles of a railroad would

be at least doubled in value by the location and construction of a road so near them, and that such increased value was a compensation to the government for giving the alternate sections to aid in the construction of the road. Hence the price of $2.50 per acre within the six-mile limits has always been deemed the equivalent of $1.25 without those limits. We say, therefore, that the offer of these lands at public sale at the minimum price of $2.50 an acre, while they were within the six-mile limits, was equivalent to an offer of the same at the price of $1.25 when outside of those limits. At the public offer of $2.50 per acre of lands within the six-mile limits the lands had been refused, and there was no sense in offering them, when put by the change outside the limits, at $1.25 per acre. Practically, as we say, they had been offered at that and refused. Congress so viewed the matter, and intended, we submit, that they should not be *re*-offered. Nowhere, in all our legislation in reference to the public domain, can a law be found which requires lands that have once become subject to private entry, and the price of which may afterwards be changed, to be again offered at public sale, after the change in price, before they shall be subject to private entry, or, in other words, that a mere change in price withdraws lands from market; and if any such requirement exists, it is based wholly upon the practice of the land office; a vicious practice as respects these lands, since it is arrayed against a positive enactment of Congress as expressed in the explanatory resolution.

Mr. S. U. Pinney contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry.

They are first surveyed, then a day is appointed for their sale by the President, which is to be kept open for two weeks. At this sale they are offered at a minimum price, and cannot be sold for less, but may be sold for as much more as any one will give, and what remains unsold at the close of such sale is subject to entry at that price.

There is an obvious reason for requiring a public sale before leaving the lands open to private entry. It is to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for

the government the benefit of competition in case the lands should be worth more than the price fixed by Congress. This system commenced at an early period of our history, and was perfected in 1820. For a period of twenty years, beginning with the commencement of this century, the public lands were sold on credit at not less than two dollars an acre; but the mode of selling on credit working badly, it was in 1820 abandoned, and the price reduced to $1.25 per acre. (2 Stat. at Large, 73; 3 Stat. at Large, 566.)

Since that time the great body of the public domain has been brought into market, after proper notice, at this reduced price, and, unless Congress by special act ordered otherwise, private entries have never been allowed unless the land applied for had been previously offered at public sale to the highest bidder at the same price. This has been the established practice of the land office, sanctioned by the law officers of the government, and recognized by this court as a leading feature in our system of land sale. *Johnson* v. *Towsley*, 13 Wallace, 88; *Chotard* v. *Pope*, 12 Wheaton, 588; 2 Opinions of the Attorney Generals, 200; 3 Opinions of the Attorney Generals, 274; 4 *Id.*, 167.)

The inquiry arises whether Congress intended to change this system in the new policy adopted by it, to aid States by grants of lands to build railroads. This policy is of comparatively recent date, but there is nothing that we are aware, in any of the various acts on the subject, which tend to show that it was the purpose of Congress, in its land-grant legislation, to alter the *manner* in which the public lands had been brought into market and made subject to private entry. It is true the minimum price of the lands within certain prescribed limits was doubled, on the supposition that the construction of the contemplated roads would enhance the value of the lands to such an extent that the government would be enabled to realize as much for them as if the grants had not been made, but in all other respects the general system for the disposition of public lands was preserved. It is difficult, therefore, to see how the plaintiff can succeed, unless the legislation on which he rests his title was designed to be exceptional, which we think was not the case. The grant was an ordinary one to build a road in Wisconsin, for which a change of route was desirable, after the line had been located. This change was authorized by Congress, but before the line was re-located the lands in question, being within the six mile limit, had been at a

sold, were subject to entry at that price, but not at any less sum. public land sale. offered for sale at $2.50 per acre. and not being The location of the new route left them outside of the required distance. and legislation was necessary to take them out of the condition of lands affected by the construction of a railroad, and to restore them to the general body of the unsold lands, so that they could be sold in the same manner and at the same price that the public domain is usually subject to sale. This object was accomplished by the joint resolution of April 25th, 1862, which declares that "these lands should hereafter be sold at $1.25 per acre." It is contended that this declaration fixed the price absolutely, and subjected them to private entry at that price, without any further proceeding. This proposition is based on the idea that Congress intended to adopt a different rule for the disposition of these lands from that which had always obtained for the disposition of other public lands; but there is nothing in the circumstances of this legislation which tends to prove an intentional abandonment of a long existing policy. Why make an exception in the case of these lands? There was no exigency requiring it, nor any reason to suppose that Congress had any purpose to place them on a different footing from other government lands for sale at $1.25 an acre. Such a purpose would conflict with the general land system, and disturb its harmony, and cannot be imputed to Congress in the absence of an express declaration to that effect. This system required that all lands should be brought into market, after proper notice, so as to afford competition before being subject to private entry.

It is true the lands in question were once offered at public sale at $2.50 an acre, but the reason of the rule required that they should be again offered to the highest bidder, because their condition as to price had been changed, and there had been no opportunity for competition at the reduced price. Congress meant nothing more than to fix $1.25 as their minimum price, and to place them in the same category with other public lands not affected by land grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction.

It follows that the plaintiff's entries were invalid and rightly

canceled, because they were made before the lands had been proclaimed for sale at the minium price of $1.25 an acre, and that the defendant's entries were in accordance with law, as they were located after the lands had been properly brought into market.

Judgment Affirmed.

THE YOSEMITE VALLEY CASE.

(Hutchings v. Low.)

December Term, 1872.—15 Wallace, 77.

1. A party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party.
2. The power of regulation and disposition over the lands of the United States, conferred upon Congress by the constitution, only ceases under the pre-emption laws when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with the settler for the first time acquires a vested interest in the premises occupied by him of which he cannot be subsequently deprived. He then is entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the pre-emption laws give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.
3. The United States by the pre-emption laws do not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale. They simply declare by those laws that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities at fixed prices shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.
4. The case of *Frisbie* v. *Whitney* (9th Wallace, 187) affirmed.
5. The case of *Lytle* v. *The State of Arkansas* (9th Howard, 333) explained and distinguished from the present case.

6. The act of Congress of June 30th, 1864, granting the Yosemite Valley and the Mariposa Big Tree Grove to the State of California passed the title of those premises to the State, subject to the trust specified therein, that they should be held for public use, resort, and recreation, and be inalienable for all time.

ERROR to the Supreme Court of California; the case being thus:

On the 30th of June, 1864, Congress passed an act, (13 Stat. at Large, 325), granting to the State of California the cleft, or gorge, in the Sierra Nevada Mountains, situated in the county of Mariposo in that State, known as the Yosemite Valley, with its branches and spurs, in estimated length fifteen miles, and in width one mile, with the stipulation that the State should accept the grant upon the express condition that the premises should be held for public use, resort, and recreation, and should be inalienable for all time, except that leases for portions of the premises for periods not exceeding ten years might be made, the income derived therefrom to be expended in the preservation and improvement of the premises, or the roads leading thereto. The act provided that the boundaries of the grant should be established, at the cost of the State, by the surveyor general of the United States for California, whose official plat, when affirmed by the Commissioner of the General Land Office, should constitute the evidence of the locus, extent, and limits of the cleft, or gorge; and that the premises should be managed by the governor of the State, with eight other commissioners to be appointed by him, who should receive no compensation for their services.

By the same act Congress also granted to the State the tract of land embracing the grove of mammoth trees in Mariposa, known as "the Mariposa Big Tree Grove," the grant to be accepted upon similar conditions as the grant of the Yosemite Valley, and the premises to be held for like public use, resort, and recreation, and to be also inalienable for all time, but with the same privilege as to leases.

At the first session of the legislature of California, subsequently held, an act was passed by which the State accepted the grant thus made of the Yosemite Valley and Big Tree Grove, upon "the conditions, reservations and stipulations" contained in the act of Congress, and the governor, and eight commissioners, who had previously been appointed by him during the recess of the legislature, were constituted a board of commissioners,

"with full power to manage and administer the grant made, and the trust created by the act of Congress," and to make rules and regulations for the government, improvement, and preservation of the premises. The act also provided for the appointment, by the commissioners, of a guardian of the premises, and made it a penal offence in any one to commit, wilfully, any trespass thereon, to cut down or girdle the trees, to deface or injure the natural objects, to fire the wood or grass, or to destroy or injure any bridge or structure thereon, or other improvement.

On the 19th of May, 1864, six weeks previous to the passage of the act of Congress making the grant to the State, Hutchings entered the Valley of the Yosemite and settled upon lands therein, with the intention, according to his declarations, and the findings of the court, to acquire the title to the same under the pre-emption laws of the United States. There were then on the premises a house, outhouses, and a fence inclosing about three acres. These improvements Hutchings purchased of the previous occupant, and he had ever since resided upon the premises, and had improved and cultivated them. The valley, at the time, was unsurveyed, and no other acts than the settlement thus made and continued had ever been done by him to acquire the title, unless soliciting the State and Congress to recognize his claim, can be called such acts. At the time of his settlement, Hutchings was possessed of all the qualifications required of settlers under the pre-emption laws of the United States.

The principal one of these laws, and the one to which all subsequent acts refer, is the act of September 4th, 1841 (5 Stat. at Large, 453), entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights." The tenth section of this act provides that any person, of the class designated therein, who shall make a settlement upon the public lands, to which the Indian title has been extinguished, and which has been previously surveyed, and shall inhabit and improve the same, and shall erect a dwelling thereon, shall be authorized to enter, with the register of the proper land office, by legal subdivisions, one quarter-section of land, to include the residence of the claimant, upon paying to the United States the minimum price of said land, subject to certain specified exceptions, among which is, that no lands included in any reservation, by any treaty law, or proclamation of the President, or

reserved for salines, or for the support of schools, or for other purposes, shall be liable to entry.

By other sections, various provisions are enacted for the determination of conflicting claims, and the preservation of proofs of settlement and improvement. When all the prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver, and after a reasonable time to enable the land officers to ascertain whether there are any superior claims, and whether the claimant has complied, in all respects, with the law, he is entitled to a patent of the United States. (See opinion of Mr. Justice Miller, 9 Wallace, 194.)

By the sixth section of the act of Congress of March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat. at Large, 246), all the public lands of the United States, in California, whether surveyed or unsurveyed, are made, with certain exceptions, subject to the above act of September 4th, 1841, "with all the exceptions, conditions and limitations therein," with a proviso that when unsurveyed lands are claimed by pre-emption, notice of the claim shall be filed within three months after the return of the plats of the surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale including such lands; the entry of such claims to be made by legal subdivisions, according to the United States survey; and also that settlement on unsurveyed lands shall be authorized only where the settlement is made within one year after the passage of the act. This last limitation was subsequently extended, by act of Congress, two years from March 1st, 1854. (10 Stat. at Large, 268.)

In some of the States and Territories, by acts of Congress, settlements are authorized on unsurveyed lands, and by the 7th section of the act of May 30th, 1862, "to reduce the expenses of the survey and sale of the public lands of the United States" (12 Stat. at Large, 410), this privilege was extended to California.

Under this last act, Hutchings conceived that he had a right to settle upon the unsurveyed lands of the United States in the Yosemite Valley, and by the above acts of 1841 and 1853, could acquire, and had acquired, such a vested interest in the premises,

to the extent of one hundred and sixty acres, that the United States could not transfer their title to the State, or dedicate the land to any public use. He therefore refused to surrender the possession to the commissioners appointed by the State. The defendant also refused to take a lease from the commissioners, though offered to him at a mere nominal rate for ten years. They accordingly, in November, 1867, brought the present action, alleging, in their complaint, that the State was owner in fee of the premises, and that they were entitled to the possession as commissioners of the State.

Pending the action, and on the 20th of February, 1868, the legislature of California passed an act granting to the defendant and one Lamon, each, one hundred and sixty acres of land in the Yosemite Valley: the part granted to the defendant containing his improvements and the premises in controversy. The second section of the act provided that the act should take effect from and after its ratification by Congress. It had never been thus ratified. A bill to ratify it passed the House of Representatives, but failed in the Senate.

The District Court of the State, in which the action was commenced, adjudged that the defendant was right in his view of his interest, and accordingly gave judgment in his favor. The Supreme Court of the State reversed the judgment, and ordered judgment for the possession of the premises in favor of the commissioners. The defendant now brought the case here for review.

Mr. G. W. Julian for the plaintiff in error.

The question is whether Congress, in granting the valley to the State of California, could divest the right of Hutchings under the pre-emption laws? In other words, had Hutchings such a vested right or interest, that Congress could not divest it by the grant of it to another party?

The case of *Lytle* v. *The State of Arkansas*, (9 Howard, 333), is in point. There Cloyes, the pre-emptor, selected his claim under the act of Congress of May 29th, 1830, authorizing and regulating pre-emptions. A later act, dated June 15th, 1832, granted to the Territory of Arkansas one thousand acres for a court-house and jail at Little Rock, including the tract claimed. Before this grant the pre-emption right of Cloyes had accrued under the act of 1830, and he had proved his right, and done everything he could do to perfect it. The court says:

"By this grant to Arkansas, Congress could not have intended to

impair vested rights. The grants of the one thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This case is referred to in the case of *Bernard* v. *Ashley*. (18 Howard, 43.) The court says:

"In Lytle's case we declared that the occupant was wrongfully deprived of his lawful rights of entry under the pre-emption laws, and the title set up under the selection of the governor of Arkansas was decreed to Cloyes, the claimant; this court holding his claim to the land to have been a legal right by virtue of the occupancy and cultivation subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase-money."

This, it will be seen, deals with the right of pre-emption as "a legal right by virtue of the occupancy and cultivation" of the pre-emptor, "subject to be defeated only by a failure to perform the conditions of making the proof and tendering the purchase-money."

The court adds:

"The claim of pre-emption is not that shadowy thing which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right; but when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

If this is true of Cloyes, it must be equally true of Hutchings, and he can only lose his claim "by a failure to perform the conditions annexed to it," when those conditions shall be tendered for his performance. In giving the opinion in *Lytle* v. *The State of Arkansas*, the court says:

"The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling, is shown by the course of legislation for many years."

This expresses the spirit and policy of the pre-emption laws, as they have been understood by the whole country till quite recently. The pioneer settler has been treated as the favorite of the law. The court says further:

"It is a well-established principle, that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land

claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the land, which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land offices to do what, in this respect, was offered to be done."

Cloyes was held excused on the ground that he had done everything in his power to perfect his claim. Hutchings did the same. Cloyes had gone further in complying with the conditions of title than Hutchings has done, but each went as far as he could, and neither was in default. The good faith of the government is involved in both cases. There is no justice in the argument that the pre-emptor, after having made valuable improvements, and expended his money thereon, and complied with all the conditions of title which were within his power, may nevertheless be driven from his possession, his improvements confiscated, and the land conveyed to another, with notice of all the facts, who can hold it discharged from all the equities of the pre-emptor.

It is conceded on all hands that if a pre-emptor, in addition to the other acts required of him, has paid for the land, he has acquired a vested right to it, and the government is bound to give him the title; but this concession yields the whole case. If the government is bound by its good faith to protect the settler at one stage of his claim and as to one condition of title, it is bound to protect him at all stages and as to every condition. The condition of final payment is no more vital or sacred, either to the settler or the government, than any of those which precede it. In the language already quoted, "it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres." But of what value is this "privilege," if the settler holds it at the mere will of the government, which may cut him off at any moment? And what must be thought of a government which holds its individual citizens to perfect good faith by compelling them to perform their engagements, and yet violates its own faith to the settler, that he should have a home on its lands on specified conditions, with which he is ready and willing to comply? Nor is this question answered by saying that the settler has the option to abandon his pre-emption at any time, and that the government, therefore, should be equally free. The option of the pre-emptor is properly given by

the law; for if he abandons his claim, the land, with the improvements made upon it, reverts to the government, which loses nothing. The transaction has been likened to a contract for the sale of lands in which the owner retains the title as security for the purchase-money. On the other hand, if the settler, after spending his money and his time in improving his pre-emption and making for himself a home, as in the present case, is driven away by the government without any default on his part, he loses all unjustly, and is without remedy.

This case of *Lytle* v. *The State of Arkansas* deserves particular regard, not only because the principles laid down in it settle the case under consideration in favor of Hutchings, but because it sustains the true land policy of the nation, as universally understood, till within a very recent period.

The counsel on the other side will rely on *Frisbie* v. *Whitney*, (9 Wallace, 187), the only authority of any federal court which can be cited in favor of the doctrine now set up as to the rights of settlers under the pre-emption laws. The case is in the face of the explicit language of the court in the case of *Lytle* v. *The State of Arkansas*, of which, however, it takes no notice. It is against the current of authorities on the question in the federal courts, and against the whole spirit and policy of our land laws. It refers to the different sections of the pre-emption act of 1841, but takes no notice of the judicial constructions of the act in favor of the rights of the settler under that act. It cites in support of the points affirmed sundry opinions of attorneys general and decisions of State courts, which at the best are not binding and conclusive authorities in this court; while it fails to discuss or scarcely to refer to the strong cases decided in the federal courts in favor of an opposite interpretation of the right of pre-emption.

The facts also of the case of *Whitney* v. *Frisbie*, are peculiar; and the claim of Hutchings cannot be held as conclusively settled adversely, to our view, by that single case.

Mr. E. L. Goold, contra.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

The simple question presented for determination is whether a party, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the

pre-emption laws, does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. If such be the effect of mere settlement, with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the government. It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by mere settlement of a party, with a declared intention to purchase, could be attributed to its legislation.

The question here presented was before this court, and was carefully considered in the case of *Frisbie* v. *Whitney*, reported in the 9th of Wallace. And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner, that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled

upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

The decision in *Frisbie* v. *Whitney*, was pronounced by a unanimous court, and subsequent reflection has satisfied us of its entire soundness. The construction there given to the pre-emption laws is, as there stated, in accordance with the construction uniformly given by that department of the government to which the administration of the land laws is confided, and by the chief law officers of the government to whom that department has applied for advice on the subject. It is the only construction which preserves a wise control in the government over the public lands, and prevents a general spoliation of them under the pretence of intended settlement and pre-emption. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the government, a convenient protection for any trespass and waste, in the destruction of timber, or removal of ores, which he might think proper to commit during his occupation of the premises.

The argument of the defendant's counsel, and his criticism of the decision in *Frisbie* v. *Whitney*, are founded upon a misapprehension of the language used in some previous opinions of this court, and particularly of language used in the opinion in the case of *Lytle* v. *The State of Arkansas*. (9 Howard, 333.) This last case, and the language there used, did not escape the attention of the court in the consideration of *Frisbie* v. *Whitney*. That, and other cases in which the equitable rights of persons claiming under the pre-emption laws had been protected against the legal title acquired by others, in disregard of their rights, were cited by counsel and commented upon on the argument, as asserting principles inconsistent with the construction of those laws given by the court. But the court, without examining in the opinion the cases cited in detail, stated that, in nearly all of them, the party, whose equitable right was protected, had acquired a vested right by action of the land officers, and payment and acceptance of the price of the land, which those officers had disregarded; and that, in the other cases, the successful party had established his legal right of preference of

purchase over others, under existing law, and that, in these particulars, those cases were widely different from that of *Frisbie* v. *Whitney*.

But inasmuch as counsel of the defendant,[1] who appeared also as one of the counsel in this last case, again urges upon our attention the case of *Lytle* v. *Arkansas*, and contends, with much earnestness, that it sustains principles in conflict with those expressed in *Frisbie* v. *Whitney*, and also settles the case at bar in favor of the defendant, we are induced to state, at some length, what that case was, and what it actually decided. In that case, a pre-emptioner by the name of Cloyes, claimed a right to make an entry of certain lands, under the act of Congress of May 29th, 1830. That act gave to every occupant of the public lands, prior to its date, who had cultivated any part thereof in the year 1829, a right to enter, at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, including his improvements, provided the land was not reserved for the use of the United States, or either of the several States. It required, before any entries could be made, that proof of settlement or improvement by the claimant should be made, to the satisfaction of the register and receiver of the land district, pursuant to rules prescribed by the Commissioner of the General Land Office. Under rules thus prescribed, proof was made of the cultivation and improvement of Cloyes, which was satisfactory to the register and receiver, and payment of the price was offered by him. Those officers held that he was entitled to enter one of the fractional sections claimed—the one upon which his improvement was made, and not the others—and issued a certificate to him to that effect. The plats of the township where the land was situated not having been furnished by the surveyor general, as required, the formal entry with the register could not be made, but in lieu thereof, under instructions of the Commissioner of the General Land Office, proof, identifying the land claimed, was allowed to be filed. The act of 1830 expired in one year, and the public surveys of the land were not completed until December, 1833, and were not returned to the land office until the beginning of 1834. Cloyes had thus done all that he could do to perfect his right to the title of the United States, under a law which opened the land for sale in limited quantities, at specified prices, to its occupants and cultivators.

Subsequently, in July, 1832, Congress passed an act giving to

parties entitled to pre-emption under the act of 1830, one year from the time when the township plats should be returned, to enter the lands. Under this act the heirs of Cloyes, he having died, made payment to the receiver for the fractional section to which his pre-emption claim was allowed in 1830, as already stated, and also for the fractional sections to which his claim was rejected, and applied to the register to enter them, but that officer refused to allow the entry. The court held that, so far as the fractional quarter-section to which the claim was allowed by the register and receiver in 1830 was concerned, the refusal did not affect the right of the claimant. And it is with respect to the inability of Cloyes to make the entry in 1830 for want of the township plats which the surveyor general had failed to return, and the refusal of the register to allow the entry subsequently under the act of 1832, that the language cited by counsel was used by the court; namely, that, "It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for pre-emption stands before us in a light not less favorable than it would if Cloyes or his representatives had been permitted by the land officers to do what in this respect was offered to be done."

There is no question about the correctness of the doctrine here announced; it is only a familiar principle which is stated, that where one offers to do everything upon which the acquisition of a right depends, and is prevented by fault of the other side, his right shall not be lost by his failure.

The principle only applies where, by law or contract, the acquisition of a right is made dependent upon the performance of certain specified acts. There can be no such thing as the acquisition of a right of pre-emption, that is of a right to be preferred in the purchase of property of the United States, until such property is open for sale. In the case from Arkansas the law of 1830

authorized the entry and sale of the land to the occupants and cultivators: it prescribed certain things to be done to entitle them to purchase: these things were done, or would have been done by Cloyes if the officers of the government, appointed to aid in their performance, had not failed in their duty. The hindrance to the complete performance of everything required of the claimant could not impair his rights. And it was immediately after affirming the validity of his claim, notwithstanding this hindrance, that the court used the language upon which so much stress is placed by the defendant's counsel, to the effect that a claim of pre-emption is not a "shadowy right," but when covered by the law is a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. This language was undoubtedly correct as applied to the claim of Cloyes, as then situated, which gave occasion to it, and it is in a general sense correct as applied to every claim of pre-emption. Such claim, it must remembered, is only a claim to be preferred in the purchase of the lands of the United States in limited quantities, at fixed prices, when the lands are offered for sale in the usual manner. When one has acquired this claim by complying with the conditions of the law for its acquisition he has a legal right to be thus preferred, when the sale is made, as against others asserting a similar right under the law, which the court will enforce in proper cases. But the claim of pre-emption, as already said, can never arise when the law does not provide for a sale of the property. Until thus sanctioned by the law, the claim, as stated by the court in that case, has no existence as a substantive right.

There is nothing in the case of the defendant which is at all analogous to that of Cloyes. Here the land occupied by the defendant was never offered for sale, but was excluded from any possible sale by appropriation to perpetual public use, resort, and recreation. Nothing was therefore required or should be required of the defendant for the acquisition of the title, and nothing could be, or was done by him to that end.

In the case from Arkansas, the right of Cloyes had been defeated by the failure of the executive officers to perform their duty under the law, he having complied fully with its provisions, except so far as he was prevented by such failure, and having thus acquired a right to the title of the government. In the present case no default on the part of the executive officers is alleged

or pretended. The ground of complaint is that the defendant could not acquire the title under the pre-emption laws, because Congress had granted the land to the State and thus withdrawn it from sale. In the one case it is the act of the executive officers which is the ground of complaint; in the other it is the action of Congress.

The court cannot assume, and then found a decree upon the truth of the assumption, that the defendant would have complied with the provisions of the pre-emption laws, had Congress never made the grant. Nor could it make any such assumption, even if it were held that those laws surrendered unconditionally the entire public lands to settlers, instead of allowing them the privilege of pre-emption, provided that the lands are offered for sale in the usual manner.

In June, 1832, Congress passed an act granting to the Territory of Arkansas one thousand acres of land, contiguous to and adjoining the town of Little Rock, for the erection of a court-house and jail. The grant was not of any specific tract, but only of a specified quantity, to be selected by the governor. Previous to the selection by him, and previous to the grant, Cloyes had acquired a right, as already stated, to the title of the government. This was a vested right, and the court very properly held that Congress, in making the grant to Arkansas, did not intend to impair vested rights, and that the grant must be so construed as not to interfere with the pre-emption of Cloyes. No other ruling would have been consistent with settled principles. Had the lands in the Yosemite Valley been open for sale, and had Hutchings acquired a right to the title of the United States by complying with all the conditions upon which the acquisition of that title depended before the grant to the State, his position would have some analogy to that of Cloyes. His right to the title would then have been a vested right, and the grant to the State would then have been construed so as not to interfere with his pre-emption. But his declarations as to what he would have done had the land not been withdrawn by Congress from the operation of the pre-emption laws, are unavailing for any purpose.

The case of *Lytle* v. *Arkansas*, is confessedly the strongest case which counsel can cite in support of the anomalous views advanced by him. It is manifest from the statement we have made of the facts of that case, that neither the case itself, nor the language used in the opinion of the court, when considered in

connection with the facts, give the slightest countenance to those views; but that the decision of the court, and the doctrines expressed in the opinion, are in entire harmony with the principles announced in *Frisbie* v. *Whitney*. The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States: and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell. It seems to us little less than absurd to say that a settler, or any other person, by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.

The act of California, of February, 1868, attempting to grant the premises in controversy to the defendant, is, by its own terms, inoperative until ratified by Congress. No such ratification has ever been made, and it is not believed that Congress will ever sanction such a perversion of the trust solemnly accepted by the State. *Judgment affirmed.*

1. Mr. Julian's name was printed as one of the counsel to the brief filed for the defendant in *Frisbie* v. *Whitney*, though his name is not given in the report of the case in 9th Wallace, he not having participated in the oral argument.—REP.

SHERMAN v. BUICK.

October Term, 1876.—3 Otto, 209.

1. Testimony, whether parol or documentary, which shows a want of power in officers who issue a patent, is admissible in an action at law to defeat a title set up under it. In such case, the patent is not merely voidable, but absolutely void, and the party is not obliged to resort to a court of equity to have it so declared.
2. In construing the act of March 3, 1853 (10 Stat., 246), the court held: 1. School sections sixteen and thirty-six, granted to the State of California by sect. 6 of the act, are also excepted from the operation of the pre-emption law to which, by the same section, the public lands generally are subjected. 2. The rule governing the right of

pre-emption on school sections is provided by the seventh section of the act; and it protects a settlement, if the surveys, when made, ascertain its location to be on a school section. 3. In such case, the only right conferred on the State is to select other land in lieu of that so occupied. 4. The proviso to the sixth section, forbidding pre-emption on unsurveyed lands, after one year from the passage of the act, is limited to the lands not excepted out of that section, and has no application to the school sections so excepted.

ERROR to the Supreme Court of the State of California.

The plaintiff in error brought suit in the proper court of the State of California to recover possession of a part of section 36, township 5 south, range 1 east, Mount Diablo meridian, and asserted title thereto under a patent from the United States, bearing date May 15, 1869. The defendant claimed under a patent from the State of California, of the date of Jan. 1, 1869. The title of the State is supposed to rest on the act of Congress of March 3, 1853 (10 Stat., 246), granting to her, for school purposes, with certain limitations, every sixteenth and thirty-sixth section within her boundaries, according to the surveys to be thereafter made of the public lands.

The plaintiff, in aid of his patent, and to defeat the title of the State under the act of 1853, offered to prove that, as early as Dec. 20, 1862, he had settled upon the land, and had ever since resided on it; that it was not surveyed until Aug. 11, 1866; that he had filed and proved his pre-emption claim to it Nov. 6, 1866; and paid for it, and received a patent certificate, on which his patent was duly issued.

The court excluded this evidence, and gave judgment for the defendant, which was affirmed by the supreme court: whereupon, the plaintiff sued out this writ of error. The sections of the act which bear upon the case are set forth in the opinion of the court.

Mr. Philip Phillips, *Mr. S. M. Wilson*, and *Mr. George A. Nourse*, for the plaintiff in error.

1. It was competent for the plaintiff to show that the State, at the date of her patent to the defendant, had no title to the lands in controversy. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat., 381; *Patterson* v. *Tatum*, Pacific Law Reporter, Oct. 6, 1874; *Doll* v. *Meader*, 16 Cal., 295; *Terry* v. *Megerle*, 24 *Id.*, 609; *Reichart* v. *Felps*, 6 Wall., 160; *Morton* v. *Nebraska*, 21 Id., 660.

2. The legal title to sections sixteen and thirty-six did not vest

in the State until they were marked out and defined by survey. Until then, the grant to her was in the nature of a float- *Middleton* v. *Lowe*, 30 Cal., 596; *Railroad* v. *Fremont County*, 9 Wall., 94; *Gaines* v. *Nicholson*, 9 How., 356; *Cooper* v. *Roberts*, 18 *Id.*, 173. The settlement of the plaintiff having been made before such survey, was within the exception contained in the seventh section of the act of 1853. The grant, therefore, did not embrace the lands covered by that settlement, and the patent of the State was an absolute nullity.

3. The intention of Congress to protect pre-emption settlements made on school sections, before such survey, is clearly manifested by the provision authorizing the State to select other lands in lieu of those on which such settlements were made.

Mr. Montgomery Blair for the defendant in error.

1. The grant of sections sixteen and thirty-six was *in præsenti*. No settlement on the lands in controversy having been made by the plaintiff at the date of the act, or within one year thereafter, they were not excepted from the grant. *Houghton* v. *Higgins*, 25 Cal., 255; *Doll* v. *Meader*, 16 *Id.*, 296; *VanVolkenburg* v. *McCleud*, 21 *Id.*, 330; *Summers* v. *Dickinson*, 9 *Id.*, 554; *Owen* v. *Jackson*, *Id.*, 322; *Keeran* v. *Griffith*, 27 *Id.*, 87; *Robinson* v. *Forest*, 29 *Id.*, 317; *Bludworth* v. *Lake*, 23 *Id.*, 255; *Mezerle* v. *Ashe*, 27 *Id.*, 328; 33 *Id.*, 74; *Rutherford* v. *Greene*, 2 Wheat., 196.

2. Although a survey was required to identify these sections by specific boundaries, a vested interest passed to the State by force of the act of 1853. The doctrine of relation has been uniformly applied when executive acts, whether by survey or patent, are required to give full effect to a grant. The title, whenever they are completed, inures as of the date of the inception of the grant, and defeats all intervening claims. *Landis* v. *Brant*, 10 How., 373; *Kissell* v. *The Public Schools*, 18 *Id.*, 19; *Cooper* v. *Robers*, *Id.*, 173; *Choteau* v. *Gibson*, 13 Wall., 92; *Maguire* v. *Tyler*, 8 *Id.*, 650; *Railroad Company* v. *Smith*, 9 *Id.*, 95; *Veeder* v. *Guppy*, 3 Wis., 502.

It is said, on the other side, that the grant does not attach to the school sections till they are surveyed, because, till then, there were no such sections. This proves too much. If the thing granted did not exist, or was not described with certainty, the grant would be void, which is not the argument. The thing granted is the land which did exist. "Section" is only a word of description, but it is a certain and enduring description:

and a grant of a particular section is equally operative to appropriate it, whether its lines have been already run, or are hereafter to be run in the same manner, making the location only a question of measurement and calculation. Hence the description is as complete in the one case as in the other, and is so treated by the law; for the grant applies in terms to the "surveyed and to the unsurveyed land." As much violence is done to the language by withholding the "unsurveyed" lands from the schools as by denying them to pre-emptors.

3. Subsequent acts, extending the permission to settle upon unsurveyed lands, have no bearing upon this case. They cannot operate to recall the grant of 1853, or impair the rights which the State acquired under it. The government cannot resume its grants. *New Orleans* v. *De Armas*, 9 Pet., 224.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The contest in this case is between a patent of the United States and a patent of the State of California. To determine which of them conveyed under the facts offered in evidence, the title to the land in controversy, a construction of the act of 1853 is required. It is entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and is the first act of Congress which extended the land system of the United States over the newly acquired territory of that State. It provided for surveys, for sales, for the protection of the rights of settlers, miners, and others; and, among the other purposes mentioned in the caption, for magnificent donations to the State of lands for schools and for public buildings.

The sixth and seventh sections of the act are of chief importance in the matter under consideration; the preceding sections having provided for surveying all the lands. The clause of the sixth section, in which the grant to the State of the sixteenth and thirty-sixth sections for school purposes is found, reads as follows:

"All the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township; and, with the exception of lands appropriated under this act, or reserved by competent authority, and excepting also, the lands claimed under any foreign grant or title, and the mineral lands,

shall be subject to the pre-emption laws of the 4th of September, 1841, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

Then come several provisos, which we will consider hereafter: but we pause here to note the effect of this granting and excepting clause on the lands which should, by the future surveys of the government, be found to be sections sixteen and thirty-six.

It is obviously the main purpose of the section to declare, that after the lands are surveyed they shall be subject to sale, according to the general land system of the government; and, secondly, to subject them to the right of pre-emption as defined by the act of 1841, and to extend that right to lands unsurveyed as well as to those surveyed.

But here it seemed to occur to the framer of the act, that California, like other States in which public lands lay, ought to have the sixteenth and thirty-sixth sections of each township for school purposes, and that they should not be liable to the general pre-emption law, as other public lands of the government would be. He accordingly injected into the sentence the grant of these lands to the State, and the exception of them from the operation of the pre-emption law of 1841, together with other lands which in like manner were neither to be sold nor made subject to pre-emption. These were lands appropriated under the authority of that act, or reserved by competent authority; lands claimed under any foreign grant or title (*i. e.* Mexican grants); and mineral lands. All these were by this clause exempted from sale and from the general operation of the pre-emption laws.

But the experience of the operation of our land system in other States suggested that it might be ten or twenty, and in some instances thirty, years before all the surveys would be completed and the precise location of each school section known. In the meantime, the State was rapidly filling up by actual settlers, whose necessities required improvements, which, when found to be located on a school section, should have some protection. What it should be, and how the relative rights of the settler and of the State should be also protected under these circumstances, is the subject of a distinct section of the act; the one succeeding that we have just considered.

That section (7) provides: "That when any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or when such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof." That it was the purpose of this section to provide a rule for the exercise of the right of pre-emption to the school lands granted by the previous section cannot be doubted. The reason for this is equally clear; namely, that these lands were not only granted away by the preceding section and inchoate rights conferred on the State, but they were, with other classes of lands, by express terms excepted out of the operation of the pre-emption laws which it was a principal object of that section to extend to the public lands of California generally.

Whether a settler on these school lands must have all the qualifications required by the act of 1841, as being the head of a family, a citizen of the United States, &c., or whether the settlement, occupation, and cultivation must be precisely the same as required by that act, we need not stop to inquire. It is very plain that, by the seventh section, so far as related to the date of the settlement, it was sufficient if it was found to exist at the time the surveys were made which determined its locality; and, as to its nature, that it was sufficient if it was by the erection of a dwelling-house, or by the cultivation of any portion of the land.

These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other land agreeably to the act of 1826, subject to the approval of the Secretary of the Interior.

But it is said that the right of pre-emption thus granted by the seventh section was subject to the limitation prescribed by the third proviso to the sixth section; namely, "that nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settler be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that date." And such was the opinion of the Supreme Court of California. And

that court, assuming this to be true, further held, that the grant made by the act of the school sections was a present grant, vesting the title in the State to the sixteenth and thirty-sixth sections absolutely, as fast as the townships were surveyed and sectionized. *Higgins* v. *Houghton*, 25 Cal., 252. As a deduction from these premises, it held, that the right to pre-emption on these lands expired with the lapse of the year from the passage of the act, and that no subsequent act of Congress could revive or extend it, even if it was so intended.

But we are of opinion that the first of this series of propositions is untenable.

The terms of the proviso to the sixth section, and those of the seventh section, if to be applied to the same class of lands, are in conflict with each other. The one says, that if settlement be made on land before the survey, which by that survey is found to be on the sixteenth or thirty-sixth section, the settlement shall be protected; the other says, that no settlement shall be protected unless made within one year after the passage of the act. In view of the well-known fact that none of these surveys would be completed under several years, the provision of the seventh section was a useless and barren concession to the settler, if to be exercised within a year, and, in the history of land titles in that State, would have amounted to nothing. This apparent conflict is reconciled by holding to the natural construction of the language and the reasonable purpose of Congress, by which the limitation of one year to the right of pre-emption in the sixth section is applicable alone to the general body of the public lands not granted away, and not excepted out of the operation of the pre-emption law of 1841, as the school lands were, by the very terms of the previous part of the section; while section 7 is left to control the right of pre-emption to the school sections, as it purports to do.

In this view of the matter, the very learned argument of counsel on the question of the character of the grant as to the time when the title vests in the State, and the copious reference to the acts of Congress and of the State as authorizing pre-emption after the expiration of one year from the date of the statute, are immaterial to the issue. Actual settlement before survey made, accompanied the grant as a qualifying limitation of the right of the State, which she was bound to recognize when it was found to exist, and for which she was authorized to seek indemnity in another quarter. There is, therefore, no necessity for any addi-

tional legislation by Congress to secure the pre-emption right as to school sections, and no question as to whether it has so legislated or whether such legislation would be valid, and we do not enter on those questions.

No question is made in the argument here, none seems to have been made in the Supreme Court of the State, and none is to be found in its opinion in the case as to the admissibility of the rejected testimony, if the fact which it sought to establish could be recognized by the court. Nor do we think such objection, if made, is sustainable. The testimony offered does not go to impeach or contradict the patent of the United States or vary its meaning. Its object was to show that the State of California, when she made her conveyance of the land to defendant, had no title to it; that she never had, and that by the terms of the act of Congress under which she claimed the only right she ever had in regard to this tract was to seek other land in lieu of it. The effect of the evidence was to show that the title set up by defendant under the State was void—not merely voidable, but void *ab initio*. For this purpose it was competent, and it was sufficient: for it showed that when the survey was actually made, and the land in question was found to be part of section thirty-six, plaintiff had made a settlement on it, within the meaning of the seventh section of the act of 1853, and the State could do nothing but seek indemnity in other land.

It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it so declared. *Stoddard* v. *Chambers*, 2 How., 317; *Easton* v. *Salisbury*, 21 *Id.*, 426: *Reichart* v. *Felps*, 6 Wall., 160.

Judgment reversed and case remanded, with direction to order a new trial in conformity to the principles of this opinion.

MR. JUSTICE FIELD took no part in the decision of this case.

NOTE.—A patent not absolutely void cannot be questioned by one who does not claim a prior interest in the land. *Stringer* v. *Young*, 3 Peters, 320; *Hedley* v. *Leonard*, 35 Mich., 71; *Cruise* v. *Riddle*, 21 Ala., 791; *Jenkins* v. *Gibson*, 3 La. Ann., 203; *Mumford* v. *McKenney*, 21 La. Ann., 547; *Johnson* v. *Horne*, 32 Miss., 151; *Holt* v. *Hemphill*, 3 Ohio, 232; *Buckner* v. *Lawrence*, 1 Douglas (Mich.), 19.

FERGUSON v. MCLAUGHLIN.

October Term, 1877.—6 Otto, 174.

Under sect. 6 of the act of March 3, 1853, (10 Stat., 244), a settler upon unsurveyed public lands in California has no valid claim to pre-empt a quarter-section, or any part thereof, included in his settlement, unless it appears by the government surveys, when the same are made and filed in the local land office, that his dwelling-house was on that quarter-section.

ERROR to the Supreme Court of the State of California.

Mr. J. A. Moultrie, for the defendant in error.

There was no opposing counsel.

MR. JUSTICE MILLER delivered the opinion of the court.

The case before us was originally an action to recover possession of land, brought in the proper court of the State of California.

The plaintiff proved a patent from the United States to the Western Pacific Railroad Company, and a conveyance by said company to him of the land in dispute. In conformity to the practice in the courts of California, the defendant, Ferguson, filed an answer in nature of a cross-bill in equity, which alleged that while plaintiff had the apparent legal title, he held it or should be decreed to hold it, for the benefit of the defendant. The ground of this equitable right, briefly stated, is, that the defendant had made a valid claim to the land under the pre-emption laws before the inception of plaintiff's title, and that although this matter had been contested before the officers of the land department, and they had decided in favor of the Western Pacific Railroad Company, yet that decision was erroneous in law and in fact; and he prayed the court to decree him that relief which he was in equity entitled to. The case was submitted to the court, whose findings of fact are in the record, and whose judgment in favor of the plaintiff in the court below was affirmed by the Supreme Court of the State.

This writ of error brings before us the question whether, on the facts so found, the defendant below, the plaintiff here, is entitled to be declared the equitable owner of the land for which the other party recovered judgment.

There is not the slightest evidence of fraud or of any mistake of fact in the proceedings before the land department. There is

very little evidence of what did take place there, and especially what was proved there.

But there is in the findings of the court a statement that his claim was rejected by the land office on two grounds; namely, 1, that his residence was not on any part of the congressional subdivision to which this land belonged; and, 2, that he had sold part of the land for which he had filed his original pre-emption claim.

The act of Congress of 1853, providing for the survey, pre-emption and sale of the public lands in California, which was before this court in *Sherman* v. *Buick* (93 U. S., 209), declares that all those lands, with certain exceptions not pertinent to this case, shall, whether surveyed or unsurveyed, be subject to the pre-emption law of the 4th of September, 1841, with all the exceptions, conditions and limitations therein contained.

One of those limitations is, that the person claiming the right of pre-emption to any part of the public land, must have erected a dwelling-house and made an improvement thereon, and that the congressional subdivision for which claim is made, must include the claimant's residence. It is true that, under that law, no valid settlement could be made until after the land had been surveyed, and the party could know just where he was making his residence, with reference to the congressional subdivision which he proposed to claim; while, under the act of 1853, he could settle before the surveys, and make his claim after they had been made and filed in the local office.

The officers of the land department have, however, held that, when he comes before them finally to assert his claim, he could not establish a valid claim for any quarter-section, or any part of a quarter-section, unless his dwelling-house, his actual residence, was on some part of that quarter-section. In this construction of the act of 1853, we concur, and it is fatal to the case of plaintiff in error. And this question of law is the only one of which this court can have jurisdiction in the present case.

It appears very clearly by the facts found, that Ferguson's original claim or settlement, of about one hundred and fifty acres, is subdivided by the township line which runs between townships six and seven south, of range one west, of the Mount Diablo meridian, and that about thirty acres, including his residence, fell within the latter. He afterwards secured a title to this as a settler, on land granted to the town of Santa Clara, by

act of Congress, which act provided that the grant should inure to the benefit of those who were actual settlers on any part of it.

As we have already said, the land office held that this fact was fatal to his right of pre-emption in any portion of township 6, though it adjoined his land in the other township, and was part of his improvement.

We see no error in that construction of the law, and none in the judgment of the Supreme Court of Californaia.

Judgment affirmed.

ROBINSON LYTLE and LYDIA LOUISA LYTLE, his wife, ELIAS HOOPER and MARY E. HOOPER, his wife, and NATHAN H. CLOVES, a Minor, under twenty-one years of age, by WILEY CLAYTON, his Guardian, *v.* THE STATE OF ARKANSAS, WILLIAM RUSSELL, THE REAL ESTATE BANK OF THE STATE OF ARKANSAS, the Trustees of said REAL ESTATE BANK aforesaid, RICHARD C. BYRD, JAMES PITCHER, WM. P. OFFICER, EBENEZER WALTERS, JOHN WASSELL, JOHN W. COCKE, FREDERICK W. TRAPNALL, GEORGE C. WATKINS, SAMUEL H. HEMPSTEAD, JOHN ROBINS, JOHN PERCEFULL, JAMES S. CONWAY, HENRY F. PENDLETON, JACOB MITCHELL, THOMAS S. REYNOLDS, JOHN H. LEECH, WM. E. WOODRUFF, CHESTER ASHLEY, WM. J. BYRD, WM. W. DANIEL, and JOHN MORRISON, and EDNEY, his wife.

December Term, 1849.—9 Howard, 314; 18 Curtis, 154.

Under the act of May 29, 1830 (4 Stats. at Large, 420), continued in force by the act of July 14, 1832 (4 Stats. at Large, 603), and the instructions of the commissioner of public lands, the pre-emptioner was permitted to file his proofs identifying the land in the absence of surveys; the register and receiver were constituted a tribunal to decide on the validity and extent of such pre-emption rights, and their decision can be impeached only by evidence of fraud.

Where the misconduct or neglect of a public officer is the sole cause why an individual fails to obtain a title under a valid pre-emption claim, equity will relieve him.

Under the acts above mentioned the pre-emption right is limited to the fractional quarter-section on which his improvements were made, and does not extend to adjoining fractions not exceeding one hundred and sixty acres.

The act of June 15, 1832 (4 Stats. at Large, 531), granting land to the Territory of Arkansas, did not affect a pre-emption right then duly proved.

The case is stated in the opinion of the court.

Badger and *Lawrence* for the plaintiff: *Sebastian, contra.*

McLEAN, J., delivered the opinion of the court.

This writ of error brings before us a decree of the Supreme Court of the State of Arkansas.

The complainants filed their bill in the Pulaski Circuit Court of that State, charging that Nathan Cloyes, their ancestor, during his life, claimed a right of pre-emption under the act of Congress of the 29th of May, 1830, to the northwest fractional quarter of section numbered two, in township one, north of range twelve west. That he was in possession of the land claimed when the above act was passed, and had occupied it in 1829. That he was entitled to enter, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvements, upon paying the minimum price for said land. That Cloyes, in his lifetime, by his own affidavit and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the above act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; and on the 20th of May, 1831, Hartwell Boswell, the register, and John Redman, the receiver, decided that the said Cloyes was entitled to the pre-emption right claimed. That on the same day he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre; also the northeast fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre; and also the northwest and northeast fractional quarters of section numbered one, in the same township and range, containing thirty-five acres and forty-one hundredths of an acre, the said fractional quarter-sections containing one hundred and eight acres and sixty-one hundredths of an acre, and offered to pay the United States and tendered to the receiver the sum of $\$135.76\frac{1}{4}$, the government price for the land; but the register refused to permit the said Cloyes to enter the land, and the receiver refused to receive payment for the same, on the ground that he could only enter the quarter-section on which his improvement was made.

That the other quarter-sections were contiguous to the one he occupied.

That under the act of the 25th of June, 1832 (4 Stats. at Large, 549), entitled "An act establishing land districts in the Territory of Arkansas," the above fractional sections of land were transferred to the Arkansas land district, and the land office was located at Little Rock, to which the papers in relation to this claim of pre-emption were transmitted.

The bill further states that under an act of Congress of the 15th of June, 1832, granting to the Territory of Arkansas one thousand acres of land for the erection of a court-house and jail at Little Rock, and under "An act to authorize the governor of the territory to sell the land granted for a court-house and jail, and for other purposes," dated 2d March, 1833, John Pope, then governor of said territory, among other lands, selected, illegally and by mistake, for the benefit of the territory, the said northwest fractional quarter of section numbered two, for which a patent was issued to the governor of the territory and his successors in office for the purposes stated.

That the said John Pope, as governor, under an act granting a quantity of land to the Territory of Arkansas for the erection of a public building at the seat of government of said territory, dated 2d March, 1831 (4 Stats. at Large, 473), and an act to authorize the governor of the territory to select ten sections to build a legislative house for the territory, approved 4th July, 1832 (4 Stats. at Large, 563), selected the northeast fractional quarter of section two, and the northwest fractional quarter and northeast fractional quarter of section one, as unappropriated lands; and, having assigned the same to William Russell, a patent to him was issued therefor on or about the 21st of May, 1834, both of which, the complainants allege, were issued in mistake and in violation of law, and in fraud of the legal and vested right of their ancestor, Cloyes.

That after the refusal of the receiver to receive payment for the land claimed, an act was approved, 14th July, 1832, continuing in force the act of the 29th of May, 1830, and which specially provided, that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter said lands on the same conditions, in every respect, as prescribed in said act, within one year after the survey should be made and returned, and the occupants upon fractions in like manner to enter the same, so as not

to exceed in quantity one quarter-section. And that this act was in full force before Governor Pope selected said lands, as aforesaid. That the public surveys of the above fractional quarter-sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainants paid into the land office the sum of $135.76\frac{1}{4}$, in full for the above-named fractional quarter-sections. That a certificate was granted for the same, on which the receiver indorsed, that the northwest fractional quarter of section two was a part of the location made by Governor Pope in selecting one thousand acres adjoining the town of Little Rock, granted by Congress to raise a fund for building a court-house and jail for the territory; and that that indorsement was made by direction of the Commissioner of the General Land Office.

That the register of the land office would not permit the said fractional quarter-section to be entered.

That the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes. And that the present owners of any part of these lands had also notice of the rights of the complainants.

The answer of the Real Estate Bank and trustees admits the proof of the pre-emption claim of Cloyes, but they say: "From beginning to the end it is at issue (a tissue) of fraud, falsehood, and perjury, not only on the part of Cloyes, but also on the part of those persons by whose oaths the alleged pre-emption was established. And they allege, that the lots four, five, and six, in block eight, in fractional quarter-section two, claimed by the bank, were purchased of Ambrose H. Sevier in the most perfect good faith, and without any notice or knowledge whatever, either constructive or otherwise, of any adverse claim thereto." That they have made improvements on the same, which have cost $25,000, without ever having it intimated to them that there was any adverse claim, until all of said improvements had been completed.

James S. Conway, in his answer, denies the validity of the pre-emption right set up in the bill, and alleges that it was falsely and fraudulenty proved. And he says, that when he purchased, "he did not know that there was any *bona fide* adverse claim or right to said lots, or any of them; and he avers, that he is an innocent purchaser for a valuable consideration, and without actual or implied notice, except as hereinafter stated."

And he admits that he occasionally heard the claim of Cloyes spoken of, but always with the qualification that it was fraudulent and void, and had been rejected by the government.

Samuel A. Hempstead, in his answer, denies that, at the time of the purchase of said lots, or the recording of said deed, he had notice either in fact or law, of the complainants' claim.

The other defendants filed special demurrers to the bill. The circuit court, as it appears, sustained the demurrers, and in effect dismissed the bill. The cause was taken to the Supreme Court of Arkansas by a writ of error, which affirmed the decree of the circuit court.

The demurrers admit the truth of the allegations of the bill, and consequently, rest on the invalidity of the right asserted by the complainants. The answers also deny that Cloyes was entitled to a pre-emptive right, and a part, if not all of them, allege that they were innocent purchasers, for a valuable consideration, without notice of the complainants' claim.

The first section of the act of 29th May, 1830, gave to every occupant of the public lands prior to the date of the act, and who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section, to include his improvement; provided the land shall not have been reserved for the use of the United States, or either of the several States.

In the third section of the act it is provided, that, before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On the 10th of June, 1830, the commissioner issued his instructions to the receivers and registers under the above act, in which he said, that the fact of cultivation and possession required "must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the evidence must be taken by a justice of the peace in the presence of the register and receiver." And the commissioner directed, that, where the improvement was wholly on a quarter-section, the occupant was limited to such quarter: but where the improvement is situated in different quarter-sections adjacent, he

may enter a half quarter in each to embrace his entire improvement.

Another circular, dated 7th February, 1831, was issued, instructing the land officers, where persons claiming pre-emption rights had been prevented under the above circular from making an entry, "by reason of the township plats not having been furnished by the surveyor general to the register of the land office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May next." And they were requested to "keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish to their entire satisfaction the right of the parties, respectively, to a pre-emption," &c. "No payments, however, were to be received on account of pre-emption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."

Under this instruction, on the 28th of May, 1831, the register and receiver held that Nathan Cloyes was entitled to the north-west fractional quarter, as stated in the bill, but rejected the privilege of entering the adjoining fractions.

Several objections are made to this procedure. It is contended that the land officers had no authority to act on the subject, until the surveys of the township were returned by the surveyor general to the register's office; and also, that in receiving the proof of the pre-emption right of Cloyes, the land officers did not follow the directions of the commissioner.

The first instruction of the commissioner, dated 10th June, 1830, required the proof to be taken in presence of the register and receiver, and it appears that the proof was taken in the presence of the register only.

The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the commissioner required the proof to be so taken.

Having the power to impose this regulation, the commissioner had the power to dispense with it, for reasons which might be satisfactory to him. And it does appear that the presence of the register only, in Cloyes' case, was held sufficient. The right was sanctioned by both the land officers, and by the commissioner also, so far as to receive the money on the land claimed, without

objection as to the mode of taking the proof. And as regards the authority for this procedure by the land officers, it appears to be covered by the above circular of the commissioner, dated 7th February, 1831. In the absence of the surveys, the parties entitled to the benefits of the act of 1830, were "permitted to file the proof thereof," &c., identifying the tract of land, as well as circumstances will admit, any time prior to the 30th of May, 1831.

The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final. The proof of the pre-emption right of Cloyes being "entirely satisfactory" to the land officers under the act of 1830, there was no necessity of opening the case, and receiving additional proof, under any of the subsequent laws. The act of 1830, having expired, all rights under it were saved by the subsequent acts. Under those acts, Cloyes was only required to do what was necessary to perfect his right. But those steps within the law, which had been taken, were not required to be again taken.

It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer the law will protect him. In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done.

The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an

enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not unfrequently dangers, from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years. It is insisted that the pre-emption right of Cloyes extended to the fractional quarter-sections named in the bill, the whole of them being less than 160 acres. We think it is limited to the fractional quarter on which his improvement was made. This construction was given to the act by the commissioner in his circular of the 10th of June, 1830. He says: "The occupant must be confined to the entry of that particular quarter-section which embraces the improvement." The act gives to the occupant whose claim to a pre-emption is established the right to entry, at the minimum price, by legal subdivisions, any number of acres not exceeding 160. But less than a legal subdivision of a section or fraction cannot be taken by the occupant. It is contended, however, that several fractional quarter-sections adjacent to the one on which the improvement was made, may be taken under the pre-emptive right, which shall not exceed in the whole 160 acres.

And the second section of the act of 14th July, 1832, which provides, "that the occupants upon fractions shall be permitted, in like manner, to enter the same so as not to exceed in quantity one quarter-section," it is urged, authorizes this view. But in the case of *Brown's Lessee* v. *Clements et al.*, 3 How., 666, this court say, the act of 29th May, 1830, "gave to every settler on the public lands the right of pre-emption of 160 acres; yet, if a settler happened to be settled on a fractional section, containing less than that quantity, there is no provision in the act by which he could make up the deficiency out of the adjacent lands, or any other lands."

Did the location of Governor Pope, under the acts of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the Territory of Arkansas, to be located by the governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions

of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office.

He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him. In the case above cited from 3 Howard, the court say: "The act of the 29th May, 1830, appropriated the quarter-section of land in controversy, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter-section was not liable to any other claim." &c. And the supplement to this act, approved 14th July, 1832, extended its benefits. The instruction of the commissioner, dated September 14, 1830, was in accordance with this view. He says: "It is, therefore, to be expressly understood, that every purchase of a tract of land at ordinary private sale, to which a pre-emption claim shall be proved and filed according to law, at any time prior to the 30th of May, 1831, is to be either null and void, (the purchase-money thereof being refundable under instructions hereafter to be given), or subject to any legislative provisions."

By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes.

The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption right claimed by the representatives of Cloyes; and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed; and the cause is transmitted to that court for further proceedings before it, or as it shall direct, on the defence set up in the answers of the defendants, that they are *bona fide* purchasers of the whole or parts of the fractional section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved, as equity shall require.

CATRON, J., NELSON, J., and GRIER, J., dissented.

CATRON, J. The complainants allege that they have the superior equity to the fractional quarter-section No. 2, and to the other lands claimed by the bill, by virtue of an entry under

a preference right; and that the respondents purchased and took their legal title with full knowledge of such existing equity in the complainants.

1. The defendants claiming section No. 2 (or part of it) deny that any such equity exists under the legislation of Congress. 2. That they purchased and took title without any knowledge of the claim set up; and being innocent purchasers, no equity exists as to them for this reason also, regardless of anything alleged against them. 3. That they expended large sums on the lands purchased, and made highly valuable improvements thereon, without any objection being made by complainants, or notice of their claim being given to respondents, and therefore a court of equity cannot interfere with their existing rights.

The bill was dismissed without any particular ground having been stated in the decree why it was made for respondents; and in this condition of the records, the cause is brought here by writ of error under the 25th section of the judiciary act. (1 Stats. at Large, 85.)

The case made on the face of the bill was rejected, and the inquiry on such general decree must be, whether the claim set up sought protection under an act of Congress, or an authority exercised under one, so as to draw either in question, no matter whether the claim was well founded or not, and the fact being found that such case was made, then jurisdiction must be assumed to examine the decree; and, this being clearly true in the present instance, jurisdiction must be taken, and the equity claimed on part of complainants re-examined.

If, however, the decree had proceeded on the second or third grounds of defence, regardless of the first, and had so declared, then this court would not have jurisdiction to interfere, as no act of Congress, or an authority exercised under it, would have been drawn in question.

In regard to the lands claimed, except the fractional quarter-section No. 2, we are agreed that the bill should be dismissed. So far, the controversy is ended; and, as to section No. 2, I think the bill should be dismissed also.

The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office, having reference to that act. The act itself, the instruction given under its authority,

and the proofs taken according to the instructions, expired and came to an end on the 29th of May, 1831.

After that time, the matter stood as if neither had ever existed; nor had Cloyes more claim to enter from May 29, 1831, to July 14, 1832, than any other villager in Little Rock.

July 14, 1832, another pre-emption law was passed, providing, among other things, that when an entry could not be made under the act of 1830, because the public surveys were not returned to the office of the register and receiver before the expiration of that act (29th May, 1831), then an occupant who cultivated the land in 1829, and was in actual possession when the act of 1830 was passed, should be allowed to enter, under the act of 1832, the quarter-section he occupied; and also adjoining lands to which the improvement extended, in legal subdivisions, so as to increase his entry to a quantity not exceeding 160 acres. Under the act of 1832, the entry in controversy was offered, and afterwards allowed, for the purpose of letting in complainants, so that a court of justice might investigate their claim, although it had been pronounced illegal at the department of public lands, the officers there acting under the advice of the Secretary of the Treasury.

The act of 1830, and the circular under it, having expired, the commissioner issued a new circular (28th July, 1832, 2 Land Laws and Opinions, 509), prescribing to registers and receivers the terms on which entries should be allowed under the act of 1832, by which circular proof was required of cultivation in 1829, and residence on the 29th of May, 1830, and that this proof should be made after the legal surveys were returned to the office of the register and receiver; and the right to make the proof, and to enter, should continue for one year after the surveys were returned, unless the lands were sooner offered at public sale; and that then the entry should be made before the public sale took place.

The necessity of this new proceeding is manifest. By the act of April 5, 1832 (4 Stats. at Large, 503), all actual settlers at this date (5th April, 1832), were authorized to enter, within six months thereafter, one half quarter-section, including their respective improvements. Such rights stood in advance of claimants under the act of July 14, 1832. In the mutations of a new country, the fact was well known that improvements passed from hand to hand with great frequency by the sale of the

possessions; and one in possession (April 5, 1832,) could well enter an improvement cultivated in 1829, and held on the 29th of May, 1830, he having purchased such possession. If Cloyes, therefore, had sold out to another before the act of April 5 was passed, then that other occupant, and not Cloyes, would have had the right to enter section No. 2; and, therefore, it was highly necessary to know who had the best right to a pre-emption at the time each entry was offered. A still greater necessity existed for new proof. Until the surveys were returned, it was usually impossible for the register and receiver to know what subdivision had been occupied, or to what land, or how much, the pre-emption right extended; and as all those who had a right of entry on lands not surveyed, and legally recognized as surveyed, were provided for by the act of 14th of July, 1832, and the act required them to make proof, and to enter, within one year after the surveys were returned, by legal subdivisions, according to the surveys, it is hardly possible to conceive what other course could have been adopted at the land office than that which was pursued, as the surveys were the sole guide at the local offices where entries were made. But it is useless to speculate why the new circular was issued: the commissioner had positive power to do so, and the act, when done, bound every enterer. Nor could a legal entry be made under the act of 14th of July, 1832, without the new proof, and an adjudication by the register and receiver, founded on such proof, that the right of entry existed, and as no such proof was offered by the complainants, they had no right to enter even the 30 88-100 acres, and certainly not the 108 61-100 acres. That an entry could not be lawfully made, without new proof to warrant it, for the larger quantity, is our unanimous opinion; and in this, we concur with those conducting the General Land Office.

For another reason I think their claim should be rejected. Little Rock was the seat of the territorial government, at which certain public buildings were necessary, and on the 15th of June, 1832, an act was passed that there be then granted to the Territory of Arkansas a quantity of land not exceeding one thousand acres "contiguous to and adjoining" the town of Little Rock, for the erection of a court-house and jail in said town, which lands shall be selected by the governor of the territory, and be disposed of as the legislature shall direct, and the proceeds be applied towards building said court-house and jail.

On the 30th of January, 1833, the governor selected the land and filed his entry in the land office at Little Rock, which entry was received and forwarded to the General Land Office at Washington, and there ratified. The entry included the factional quarter-section No. 2, now claimed by the heirs of Nathan Cloyes.

By the act of March 2, 1833 (1 Stats. at Large, 667), the governor of the territory was required to furnish to the Secretary of the Treasury a description of the boundaries of the thousand acres, and the secretary was required to cause to be issued a patent therefor to the governor, in trust, &c.; and the governor was directed to lay off in town lots, as part of the town of Little Rock, so much of the grant as he might deem advisable; and said governor was authorized to sell said lots, and to dispose of the residue of said thousand acre grant, and which sale was to be at auction as regarded the town lots and the residue of the land. And he was also authorized to select and lay off three suitable squares, within this addition to the town, on which might be erected a state-house, a court-house, and a jail—one square for each building—for the use thereof forever, and for no other use.

The sales were to be for cash, and the governor was directed to make deeds to purchasers when the purchase-money was paid. A patent issued to Governor John Pope for the land. In October, 1833, he proceeded to sell at auction, in lots and blocks, the fraction No. 2, in part, to Ambrose H. Sevier, under whom most of the defendants on No. 2 claim. Those who have answered deny that they had any knowledge of the claim of Cloyes when they purchased and took title; and that complainants stood by, permitted the purchase, and saw great city improvements made and large sums of money expended without objection or any intimation being given that they intended to bring forward any such claim as the one now set up. But, as remarked in the outset, this court has no jurisdiction of these matters, and must, therefore, leave them to the State courts for adjudication and final settlement.

How, then, did the claim of complainants stand when the city lots were sold in 1833? Cloyes never offered to enter fraction No. 2 alone. He offered to enter, says the bill (28th May, 1831), with the register at Batesville sectional quarter No. 2 for 30.88 acres, northeast fractional quarter for 42.32 acres, and northwest and northeast fractional quarters of section No. 1, containing 35.41 acres, making in all 108.61 acres. The proof made was that he resided on No. 2 for 30.88 acres. This entry was refused

on a ground not open to controversy. By the act of 1830 only that quarter-section on which the improvement was could be entered, no matter what quantity it contained. In this we are unanimous now; and also that the entry allowed is void for all but the fraction No. 2. Here was an offer to enter in 1831 that could not be lawfully done at that time. Then a refusal to receive the entry was proper. The claim to enter 108.61 acres was adhered to throughout by Cloyes and his heirs. The offer to enter the whole quantity of 108.61 acres was again made in 1834, and we agree in opinion that the entry could not be lawfully received at the latter period for this larger quantity: less than the whole was never claimed.

As already stated, the entry that was admitted in 1834 was made to enable the party to litigate his rights, if any existed, as against the city title; not because the claim to enter was lawful in the estimation of the Secretary of the Treasury and the Commissioner of the General Land Office, for they had decided against its validity. The offer to enter being illegal, and the entry as received being illegal, it is not perceived on what ground a court of equity can uphold the claim even in part, and thereby overthrow a patent of the United States, and oust purchasers who relied on such patent.

In the next place, when the act of June 15, 1832, was passed, authorizing the governor of Arkansas Territory to locate the thousand acres, the act of 1830 had expired; no right of entry existed in Cloyes. The land appropriated to public use was to be taken "contiguous to and adjoining the town of Little Rock." All the land adjoining was reserved by the act, subject to a selection by the governor as a public agent. The grant was a present grant of the thousand acres, without limitation. Cloyes had no claim to interpose at that time: and on the selection being made it gave precision to the land granted, and the title attached from the date of the act. In the language of this court in *Rutherford* v. *Greene's Heirs*, 2 Wheat., 206, the grant which issued to Governor Pope in pursuance of the act of June 15, 1832, "relates to the inception of his title." That also was a present grant of 25,000 acres to General Greene, made by an act of the legislature of North Carolina, but unlocated by the act of assembly. It was granted in the military district generally, and ordered to be surveyed by certain commissioners. Soon afterwards it was located by survey, and the question presented to this court was as to what

time the title had relation for the land selected, when it was held that the grant was made by the act directly, and gave date to the title, and of necessity overreached all intervening claims for the land selected.

This case is far stronger than that. Here, the act of 1830 was made part of the act of July 14, 1832; they stood as one act, and took date on the 14th of July. The act provides: "That no entry or sale should be made, under the provisions of this act, of lands which shall have been reserved for the use of the United States, or either of the States." The land, to the quantity of one thousand acres, adjoining the then town of Little Rock, had been expressly reserved by the act of the 15th of June, and stood so reserved when the act of July 14th was passed, subject to selection in legal subdivisions. The act of June 15 had no exception; the object was of too much importance to allow of any. If this villager could claim a pre-emption, so might any other, and the act of June would have been without value, as the whole grant might have been defeated by occupant claims, and the seat of government transferred to private owners. This is manifest. Cloyes was a tinner, carrying on his trade in the edge of town, and next his dwelling; adjoining to his house and shop he cultivated a garden, and on this occupancy and cultivation his claim was founded. Others, no doubt, were similarly situated. The seat of government was located on the public lands, then unsurveyed, and if the act of July 14, 1832, conferred an equity on Cloyes to take 160 acres, so it did on others in his situation, all around the then town, and adjoining thereto. If the occupant could take the land adjoining, how was it possible for the governor to add lots and squares to the seat of government? The intention of Congress manifestly contemplated that the right of selection should extend to all lands adjoining to the then town, and that these were reserved for public use, is, in my judgment, hardly open to controversy, on the face of the act of July 14. But, when we take into consideration the fact that General Greene's title had been upheld on the principle that it took date with the act making the grant, and that the grant made in trust to Governor Pope depended on the same principle, and equally overreached all intervening claims, no doubt, it would seem, could well be entertained, either at the General Land Office, or by purchaser, that this occupant had no just claims, and could not interfere and overthrow titles derived under the act of June 15, 1832.

And this is deemed equally true for another and similar reason. If this preference of entry for public uses could be overthrown by a subsequent pre-emption law, so may every other made to secure locations for county seats and public works. The reservation was quite as definite as where salt springs and lead mines were reserved, or lands on which ship timber existed. In such cases, the President determines that the lands shall be reserved from sale, and this is always done after the surveys are executed and returned; and, certainly, had such power been vested in him to reserve lands adjoining the seat of government of Arkansas, for the use thereof, he could have lawfully made the selection; and authority to do so having been conferred by Congress on the governor, his power was equal to that of the President in similar cases, where lands are reserved for public use by general laws.

For these reasons, I think the decree ought to be affirmed; and I have the more confidence in these views because they correspond with the accumulated intelligence and experience of those engaged in administering the department of public lands, and with the practice pursued at the Gneral Land Office, from the date of the act of July 14, 1832, to this time.

ROBINSON LYTLE AND OTHERS, plaintiffs in error, *v.* THE STATE OF ARKANSAS AND OTHERS.

December Term, 1859.—22 Howard, 193; 3 Miller, 288.

Jurisdiction over State Courts—Equity Superior to Patents.

1. The judgment of the State courts protecting parties as innocent purchasers, and by reason of the Statute of Limitations, is not subject to revision in this court.
2. But the question of fraudulent and false swearing in obtaining a certificate of pre-emption and a patent from the land office is one of which this court can take cognizance.
3. An examination of the testimony in this case shows that the Supreme Court of Arkansas was right in holding that there was such fraud, and its judgment is therefore affirmed.

This is a writ of error to the Supreme Court of Arkansas. It has been in this court before, and has been repeated in 9 How., 314. As it appears now, the matter is fully stated in the opinion.

Mr. Bradley and *Mr. Stillwell* for plaintiffs in error; *Mr. Watkins*, *Mr. Pike*, and *Mr. Hempstead* for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

The first question presented on the record is, whether this court has jurisdiction to examine and revise the decision of the Supreme Court of Arkansas by writ of error, under the 25th section of the judiciary act? The question arises on the following facts:

Nathan Cloyes, ancestor of the principal complainants, entered as an occupant, at a land office in Arkansas, a fractional quarter-section of land, in 1834, under the pre-emption acts of 1830 and 1832. The fraction adjoined the village of Little Rock on its eastern side, and was for twenty-nine acres. The same land had been patented in 1833 by the United States to John Pope, governor of the Territory of Arkansas, to be appropriated to the erection of public buildings for said territory. The heirs of Cloyes claimed to have an earlier equity, by force of their pre-emption right, than that of the governor of Arkansas.

They filed their bill in equity in the proper State court to enforce this equity. That bill contained appropriate allegations to exhibit an equitable title in the plaintiffs, and the opposing right of the patentee, and thus to enable the courts to compare them. Some of the defendants demurred to the bill; others answered, denying the facts of the settlement and cultivation, and pleading the *bona fides* of their purchase and the Statute of Limitations.

The courts of Arkansas dismissed the bill in the demurrer; which judgment was reversed in this court, and the cause remanded for further proceedings. *Lytle* v. *Arkansas*, 9 How., 314. It was prepared for hearing a second time, and the courts of Arkansas have again dismissed the bill, and the cause is a second time before us.

The cause was fully heard on its merits below, and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud in fact and fraud in law; and the question is, can we take jurisdiction, and reform this general decree? It rejected the title of Cloyes; and in our opinion it is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree. 14 Peters, 360.

The decision in the Supreme Court of Arkansas drew in question an authority exercised under the United States, to-wit: that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is, therefore, subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States.

In the case of *Martin* against *Hunter's Lessee* (1 Wheat., 352), the foregoing construction of the 25th section of the judiciary act of 1789 was recognized, and has been followed since, in the cases of *Chouteau* against *Eckhart* (2 How., 372). *Cunningham* against *Ashley* (14 How., 377), *Garland* against *Wynn* (20 How., 6), and other cases.

Another preliminary question is presented on this record, namely: whether the adjudication of the register and receiver, which authorized Cloyes' heirs to enter the land, is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in the case of *Cunningham* against *Ashley* (14 How., 377); again, in *Bernard* against *Ashley* (18 How., 43); and, conclusively, in the case of *Garland* against *Wynn* (20 How., 8.)

The next question is, how far we can re-examine the proceedings in the State courts.

In their answers, the respondents rely on the act of limitations of the State of Arkansas for protection. As this is a defense having no connection with the title of Cloyes, this court cannot revise the decree below in this respect, under the 25th section of the judiciary act.

Many of the defendants also relied in their answers on the fact that they were *bona fide* purchasers of the lots of land they are sued for, and, therefore, no decree can be made here to oust them of their possessions. The State courts found that a number of the respondents were purchasers without notice of Cloyes' claim, and entitled to protection as *bona fide* purchasers, according to the rules acted on by courts of equity. With this portion of the decree we have no power to interfere, as the defense set up is within the restriction found in the concluding part of the 25th section, which declares that, no other error shall be assigned or

regarded by this court as a ground of reversal, than such as immediately respects the before-mentioned questions of validity or construction of the constitution, treaties, statutes, commissions or authorities in dispute. Mr. Justice Story comments on the foregoing restraining clause, in the case of *Martin* v. *Hunter's Lessee* (1 Wheat., 358), which construction we need not repeat.

Whether Cloyes imposed on the register and receiver by false affidavits, when he made proof of cultivation in 1829, and residence on the land in dispute on the 29th of May, 1830, is the remaining question to be examined. He made oath (23d April, 1831,) that he did live on said tract of land in the year 1829, and had done so since the year 1826. Being interrogated by the register, he stated: "I had a vegetable garden, perhaps to the extent of an acre, and raised vegetables of different kinds, and corn for roasting ears; and I lived in a comfortable dwelling, east of the Quapaw line, on the before-mentioned fraction." Being asked: "Did you continue to reside, and cultivate your garden aforesaid, on the before-named fraction, until the 29th of May, 1830?" he answers: "I did, and have continued to do so until this time."

John Saylor deposed on behalf of Cloyes in effect to the same facts, but in general terms. Nathan W. Maynor and Elliott Bursey swore that the affidavit of Saylor was true. On the truth or falsehood of these depositions the cause depends.

In opposition to these affidavits it is proved, beyond dispute, that Cloyes and his family resided at a house, for a part of the year 1828, occupied afterwards by Doctor Liser. In the latter part of 1828, they removed from that place to some log cabins, situate on the lots afterwards occupied by John Hutt, and where the Governor of Arkansas resided in 1851, when the witnesses deposed. Both places were west of the Quapaw line—the cabins standing probably one hundred yards west of the line, and which line was the western boundary of the fractional quarter-section in dispute. Cloyes resided at these cabins when he swore at Batesville, before the register, and continued to reside there till the time of his death, which occurred shortly after his return from Batesville, say in May or June, 1831, and his widow and children continued to reside at the same cabins for several years after his death. Cloyes was by trade a tinner, and in December, 1826, rented of William Russell a small house constructed of slabs set upright, in which he carried on his business of a tin-

plate worker. He covenanted to keep and retain possession for Russell of this shop against all persons, and not to leave the house unoccupied, and to pay Russell two dollars per month rent, and surrender the house to Russell or his authorized agent, at any time required by the lessor.

Under this lease, Cloyes occupied the house until the 19th day of June, 1828, when he took a lease from Chester Ashley for the same, and also for a garden. He covenanted to pay Ashley one dollar per month rent, to put and keep the building in repair; to keep and retain possession of the same until delivered back to said Ashley by mutual consent, either party having a right to terminate the lease on one month's notice. The house and garden were rented by the month.

Under this lease, Cloyes occupied the house as a tin-shop to the time of his death. Both the leases state that the shop was east of the Quapaw line, and on the public lands.

This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock he sold it to Doctor Matthew Cunningham; it passed through several hands, till it was finally owned by Col. Ashley. Buildings and cultivated portions of the public lands were protected by the local laws of the Arkansas Territory. Either ejectment or trespass could have been maintained by Ashley against Cloyes to recover the premises; nor could an objection be raised by any one, except the United States, to these transfers of possession; neither could Cloyes be heard to disavow his landlord's title. He held possession for Ashley, and was subject to be turned out on a month's notice to quit.

Cunningham and other witnesses depose that the shop rented to Cloyes stood west of the Quapaw line. It however appears from actual survey that it was on the section line, which ran through the house, taking its southeast corner on the east side, but leaving the greater part of the shop west of the line.

Another pertinent circumstance is, that when Cloyes heard the pre-emption law of 1830 was about to pass, or had passed—it is uncertain which from the evidence—he removed his wife and children, with some articles of necessary furniture, to the tinner's shop from his residence at the Hutt place, and kept his family at the shop for a few months, and then they returned to their established home. This contrivance was probably resorted to at the instance of Benjamin Desha, who had agreed with Cloyes to pay into the land office the purchase-money and all incidental expenses

to obtain a title from the government for an interest of one-half of the land. These evasions were mere attempts to defraud the law, and to furnish some foundation for the necessary affidavits to support his pre-emption claim at the land office.

On this aspect of the case the question arises whether Cloyes' possession as lessee and tenant of Ashley, occupying a shop as a mechanic, the corner of which accidentally obtruded over the section line upon the public land, and who was subject to removal by his landlord each month, was "a settlement" on the public lands within the true intent and meaning of the act of May, 1830?

That Cloyes never contemplated seeking a home on the public lands as a cultivator of the soil is manifest from the proof. He worked at his trade, when he worked at all, say the witnesses, and followed no other avocation. Our opinion is, that the affidavits on which the occupant entry was founded were untrue in fact, and a fraud on the register and receiver, and that Cloyes had no *bona fide* possession as tenant of the tinner's shop within the true meaning of the act of 1830.

We are also of opinion that the affidavits are disproved as respects the fact of cultivation in 1829. There was no garden cultivated in that year adjoining or near to the shop. To say the least, it is quite doubtful whether there was such cultivation east of the Quapaw line; and the State courts, having found that there was none, it is our duty to abide by their finding, unless we could ascertain from the proof that they were mistaken, which we cannot do; our impressions being to the contrary.

The question of cultivation in May, 1830, depended on parol evidence of witnesses. The judges below knew them; they decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent for this court to overrule the finding of a mere fact by the courts below.

On the several grounds stated we order that the decree of the Supreme Court of Arkansas be affirmed, with costs.

MR. JUSTICE MCLEAN and MR. JUSTICE CLIFFORD dissented.

MR. JUSTICE MCLEAN: I dissent from the opinion of the court as now expressed, and shall refer to the former opinion to show the nature of the case:

"After the refusal of the receiver to receive payment for the

land claimed an act was passed, 14th July, 1832, continuing the act of 29th May, 1830, and which specially provided that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter such lands, on the same conditions in every respect as prescribed in said act, within one year after the surveys shall be made and returned. And this act was in full force before Governor Pope selected said lands. That the public surveys of the above fractional sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainant paid into the land office the sum of $135.76\frac{1}{4}$ in full for the above-named quarter-section.

That a certificate was granted for the same, 'on which the receiver endorsed that the northwest fractional quarter-section two was a part of the location made by Governor Pope in selecting 1,000 acres adjoining the town of Little Rock, granted by Congress to raise a fund for building a court-house and jail for the territory, and that the endorsement was made by direction of the Commissioner of the General Land Office.' 'That the register of the land office would not permit the said fractional quarter-sections to be entered.'

It appeared that 'the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes, and that the present owners of any part of these lands had also notice of the right of the complainants.'"

In his dissenting opinion Judge Catron says: "The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office having reference to that act. The act itself, the instruction under its authority, and the proofs taken according to the instruction expired and came to an end on the 29th May, 1831. After that time the matter stood as if neither had ever existed; nor had Cloyes more claim to entry from May 29, 1831, to July, 1832, than any other villager in Little Rock."

Now, although it may be true that, until the act of 1832 had passed, the act of 1830 having expired, the pre-emptive right of Cloyes could not be perfected, yet the policy of the law was, where vested rights had accrued, which, by reason of delays in the

completion of surveys, could not be carried out, the government gave relief by extending the law. And the inchoate right was secured by the policy of the government. It is therefore not strictly accurate to say, the party entering a pre-emption has no right. He has a right, recognized by the government, by which he is enabled to perfect his right; and, under such circumstances, no new entry could interfere with a prior one, though imperfect.

This court say, the proof of the pre-emption right of Cloyes being entirely satisfactory to the land officers, under the act of 1830, there was no necessity of opening and receiving additional proof under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. No steps which had been taken were required again to be taken.

Did the location of Governor Pope, under the act of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the Territory of Arkansas, to be located by the governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office. He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him.

"By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

From the citations above made in the original opinion in this case, the following facts and principles of law are too clear to admit of doubt by any one:

1. That Cloyes' pre-emption to fractional quarter-section No. 2 was clearly established, by the judgment of the land officers and of this court.

2. That the location of Governor Pope, being subsequent to the right of Cloyes, could not affect, under the circumstances, that right, and that the conveyance was subject to it. This appears by the certificate of the land office, by the uniform action of the government in all such cases, and the good faith which has characterized the action of the government, in protecting pre-emption rights, by giving time to perfect such rights; where the govern-

ment officers had failed in doing their duty. And in addition to these considerations, in the solemn declaration of this court, "that Congress could not have intended to impair vested rights." And the court say, "the grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This court say, "The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption right claimed by the representatives of Cloyes; and as we consider that a valid right as to the fractional quarter on which his improvement was made, the judgment of the State court was reversed."

"Now, the defendants demurred to the original bill, which they had a right to do, and rest the case on the demurrers appearing on the face of the bill. But this court held Cloyes' right valid, and consequently reversed, on this head, the judgment of the State court. And the cause is transmitted to the State court for further proceeding before it, or as it shall direct on the defense set up in the answers of the defendants, that they are *bona fide* purchasers of the whole or parts of the fractional section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits may be fully presented and proved, as equity shall require."

Now, it is perfectly clear that nothing was transmitted under the direction of this court to the State court, except the latter part of the sentence beginning, "and the cause is transmitted to that court," &c. And that part relates wholly to the inquiry whether the defendats were *bona fide* purchasers of the whole or parts of the fractional section in controversy. And for this purpose, leave was given to amend the pleadings.

If there is anything in this bill which afforded any pretence to the State court to open the pleadings, and examine any matters in the bill, except those specified in its close, it has escaped my notice.

It is said in the bill, "the register and receiver were constituted, by the act, a tribunal to determine the right of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, the decision cannot be impeached on the ground of fraud or unfairness; it must be considered final."

The court here was speaking of its own powers of jurisdiction and investigation, and not the powers of any other tribunal. It was supposed that no superior court would willingly permit its judicial powers to be subverted, new parties made, new subjects introduced, and the whole proceedings reversed, at the will of an inferior jurisdiction, without the exercise of a controlling power.

This State record of Arkansas seems to have been a prolific source of controversy, as its proportions have grown to about a thousand pages, not including briefs and statements of facts. It certainly must require some skill in legislation, to draw into the State court so large an amount of business under the laws of Congress. And it may become a matter of public concern, when such a mass of judicial action is not only thrown into the State court, but new rules and principles of action are liable to be sanctioned in disregard of the laws of the United States.

Without any authority, it does appear that the judgment of the Supreme Court has been reversed by the Arkansas court, its proceedings modified in disregard of its own judgments and opinions clearly expressed, and new rules of proceedings instituted and carried out; and this under an authority given to the Arkansas court to ascertain whether certain purchases had been made *bona fide*.

Cloyes, in his lifetime, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; on the 20th May, 1831, Hartwell Boswell, the register, and John Redman, the receiver, decided that the said Cloyes was entitled to the pre-emption right claimed. "On the same day he applied to the register to enter the north-west fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre." But the register very properly decided that Cloyes could only be permitted to enter the fraction on which his improvement was made.

The Commissioner of the General Land Office, and the register and receiver, declare they were satisfied with the proof made in the case; but the Supreme Court of Arkansas decided against the pre-emption right claimed by the representatives of Cloyes: and the Supreme Court of the United States say, "as we consider that a valid right as to the fractional quarter on which the

improvement was made, the judgment of the State court is reversed."

How does this case now stand? It stands reversed upon our own records by the Supreme Court of Arkansas, and by no other power. A majority of this bench entered the judgment, as it now stands, in 1849. But through the reforming process of a record of a thousand pages, not including notes and statements of facts, it has become a formidable pile, enough to fill with dispair the first claimant of the pre-emption right.

It is true, the cause was sent down for a special purpose, every word of which I now copy:

"And the cause is transmitted to that court (the Supreme Court of Arkansas) for further proceedings before it, or as it shall direct, on the defense set up in the answers of the defendants, that they are *bona fide* purchasers of the whole or parts of the fractional sections in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved, as equity shall require."

Several of the defendants alleged that they were *bona fide* purchasers of a part or the whole of the fraction, without notice; and the object in sending the case down was to enable persons to show they were purchasers of this character. This did not necessarily involve fraud. And this embraces the whole subject of inquiry.

It would have been inconsistent for this court to say we consider the pre-emption claim by the representatives of Cloyes as a valid right, as to the fractional quarter on which his improvement was made, and on that ground to reverse the judgment of the State court, and at the same time send the case down, open to the charge of fraud and every conceivable enormity. The object was to know who were purchasers without notice. That this was the intention of the Supreme Court is palpable from the language of the entry.

The majority of the Supreme Court had full confidence in the validity of Cloyes' claim, and consequently they reversed the judgment of the State court, leaving the question open, whether the defendants were purchasers without notice. It may be that this entry would have protected all the purchasers.

From the nature of pre-emption rights, it is presumed, a person desirous of such a right is the first applicant. And the proof of

such a right, if sustained by the register and receiver and the Commissioner of the Land Office, the proof required is deemed satisfactory. It is only where a fortunate selection appears to be made, by the prospect of a city, or some great local advantage is anticipated, that a contest arises as to such a claim.

The officers of the land department, whose peculiar duty it was to protect the public rights, seemed to have discharged their duty to the satisfaction of the government. This was also entirely satisfactory to a majority of the judges of this court, with the single exception, that, from the answers, it was probable that there may have been purchasers of this right without notice. And from the evidence introduced, it would seem to have been considered that any one who at any time desired to purchase, considered himself as having a right to complain, although he had no means to make the purchase, or had no desire to make it.

If I mistake not, evidence was heard from witnesses from twenty to twenty-five years after the pre-emption right was sanctioned by the government. Such a course tends greatly to embarrass land titles under the general land law. Every one knows that a man who endeavors to obtain a pre-emption, must, in the nature of things, be a man of limited means, and incapable of maintaining an expensive suit at law; and it has always appeared to me the true policy to limit those questions to the land department of the government. At all events that they should be limited to the federal tribunals, where, it may be presumed, the land department will have an uniform administration.

As this case now stands, I think the judgment of the Arkansas Supreme Court must be reversed on two grounds:

1. Because it has reversed the judgment of this court, entered by a majority of the members at December term, 1849, in these words: "The Supreme Court of the State in sustaining the demurrers and dismissing the bill, decided against the pre-emption claimed by the representatives of Cloyes; and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed."

This is the judgment of this court as it now stands upon our docket. And—

2. The judgment of the State court must be reversed, because it wholly disregarded the directions of this court in trying the issues transmitted to it.

MYERS v. CROFT.

December Term, 1871.—13 Wallace, 291.

1. When the grantee in a deed is described in a way which is a proper enough description of an incorporated company, capable of holding land, as *ex. gr.*, "The Sulphur Springs *Land* Company," the court, in the absence of any proof whatever to the contrary, will presume that the company was capable in law to take a conveyance of real estate.
2. A grantor not having perfect title, who conveys for full value, is estopped, both himself and others claiming by subsequent grant from him, against denying title; a perfect title afterwards coming to him.
3. Under the 12th section of the act of September, 1841, "to appropriate the proceeds of the sales of public lands and to grant pre-emption rights" which section, after prescribing the manner in which the proof of settlement and improvements shall be made before the land is entered, has a provision that "all assignments and transfers of the rights hereby secured, prior to the issuing of the patent, shall be null and void"—a pre-emptor who has entered the land, and who, at the time, is the owner in good faith, and has done nothing inconsistent with the provisions of the law on the subject, may sell, even though he has not yet obtained a patent. The disability extends only to the assignment of the pre-emption right.

ERROR to the Circuit Court for the District of Nebraska, the case being thus:

An act of Congress, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "And all assignments and transfers of *the right hereby secured prior to the issuing of the patent, shall be null and void.*"

Under and by virtue of this act, one Fraily, on the 3d of September, 1857, entered a quarter-section of land in Nebraska, at the land office for the Omaha land district, with the register thereof.

On the same 3d of September, 1857—no letters-patent having as yet issued to him—in consideration of $36,000, as appeared on the face of deed, he conveyed, by a warranty deed, the premises to "The Sulphur Springs Land Company:" the company being not otherwise described in the instrument, and there being nothing in the instrument or in other proof to show whether the said

grantee was a corporation and capable of taking land, or an unincorporated company.

On the 1st of May, 1860—more than two years after the date of the deed above mentioned—Fraily made another deed, for the sum, as appeared by the instrument, of $6,000, to a certain Myers.

In this state of things, Myers sued Croft, who was in under the company, in ejectment, to try the title to the land. And the deed to "The Sulphur Springs Land Company" being in evidence on the part of the defendant, the plaintiff moved the court to rule it from the jury, for the reasons:

1st. That he had not shown that the Sulphur Springs Land Company was an organization capable of receiving the conveyance of land; and,

2d. That under the provisions of the act of Congress, already quoted, the deed was void.

The court overruled the motion, charging contrariwise, that the deed was valid and passed the title to the premises. To this ruling and charge the plaintiff excepted, and judgment having been given for the defendant the case was now here.

Messrs. N. Cobb and L. Douglass, for the plaintiff in error.

1st. Although the Sulphur Springs Land Company, as we may here admit, was in fact incorporated, the fact nowhere appears in proof. Being a chartered company it was incumbent on the defendant to show the terms of the charter, and that by them the company could take the lands.

If not a corporation, the deed was void for want of certainty in the name of the grantee.

2d. Does the 12th section of the act of Congress of September 4th, 1841, intend to prohibit the pre-emption from all alienation of the property which he has acquired under the pre-emption act prior to the issuing of the patent, or does it intend simply to prevent the transfer of the right to pre-empt?

The former view is the one best sustained by the statute. That is the way it reads; and when a statute is plain, it should not be frittered away by refinements. Until payment made for the land and certificate of purchase procured the pre-emptor has nothing which he can assign. If after certificate of purchase was obtained, there was intended to be no restriction on the sale of the land by the pre-emptor, why did the act use the words "prior to the issuing of the patent?"

The other view is, that the right secured is the right to pre-empt; and that this right is fully secured when the purchase is made of the United States. The right thus preferably to purchase cannot be transferred, and it is this alone (it may be argued) which is prohibited. If so, why did the statute use the words "prior to the issuing of the patent," instead of prior to the issuing of the certificate? Congress knew the difference between a certificate of purchase and a patent. They are different instruments and subserve a different purpose. The certificate shows that the party has entered the land and is entitled to a patent at some future time; the patent transfers the title.

According to the course of business ordinarily, patents do not issue for years after the entry is made. This case proves that fact, and it is not unreasonable to suppose Congress was apprised of that fact.

The view we take of this law best accords with the policy of the pre-emption privilege. The object of the government was, in fact, to induce settlements upon the public lands, but chiefly to confer the preferable right to purchase on those persons, usually in indigent circumstances, who actually settled or improved them. It was not to aid the speculator in lands. (*Marks* v. *Dickson*, 20 Howard, 501, 505.)

Pre-emptions for purposes of speculations will be less likely to be made if the pre-emptor is obliged to wait until the patent issues before he can alienate.

There was a similar provision in the act of 29th May, 1830 (4 Stat. at Large, 420, § 3.) The language of the two acts is almost literally the same. By the act of January 23, 1832 (*Ib.*, 496), the prohibition as to assignment and transfers of the right of pre-emption contained in the act of 1830 is removed, and it is provided that "all persons who have purchased lands under the act of May 29, 1830, may assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee, anything in the act aforesaid to the contrary notwithstanding." This shows that it was understood by Congress as restricting alienations by the pre-emptor after payment and before patent issued. The effect of allowing such transfers was such that Congress in passing the carefully-framed act of September 4, 1841, renewed the prohibition against transfers which was contained in the act of 1830. The government had witnessed the practical effect of both policies, and the judgment of Congress as embodied

in the latter act as to which is the better policy should be respected by the courts, and the language of the statute should be allowed its fair and natural meaning.

Though the point has never been before this court, it has frequently been before the State courts, and they have with great uniformity held that the pre-emptor had no transferable interest prior to the issuing of the patent. *Arbour* v. *Nettles*, 12 Louisiana An., 217; *Poirrier* v. *White*, 2 *Id.*, 934; *Penn* v. *Ott*, 12 *Id.*, 233; *Stanbrough* v. *Wilson*, 13 *Id.*, 494; *Stevens* v. *Hays*, 1 Indiana, 247; *McElyea* v. *Hayter*, 2 Porter (Ala.), 148; *Cundiff* v. *Orms*, 7 *Id.*, 58; *Glenn* v. *Thistle*, 23 Mississippi, 42–49; *Wilkerson* v. *Mayfield*, 27 *Id.*, 542; *McTyer* v. *McDowell*, 36 Alabama, 39; *Paulding* v. *Grimsley*, 10 Missouri, 210.

MR. JUSTICE DAVIS delivered the opinion of the court.

In relation to the first objection—that the Sulphur Springs Land Company was not a competent grantee to receive the title—it is sufficient to say, in the absence of any proof whatever on the subject, that it will be presumed the land company was capable, in law, to take a conveyance of real estate. Besides, neither Fraily, who made the deed, nor Myers, who claims under him, is in a position to question the capacity of the company to take the title after it has paid to Fraily full value for the property. *Smith* v. *Sheeley*, 12 Wallace, 358.

The other objection is of a more serious character, and depends for its solution upon the construction to be given the last clause of the 12th section of the act of Congress of September 4th, 1841. The act itself is one of a series of pre-emption laws conferring upon the actual settler upon a quarter-section of public land the privilege (enjoyed by no one else) of purchasing it, on complying with certain prescribed conditions. It had been the well-defined policy of Congress, in passing these laws, not to allow their benefit to enure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middle men to occupy them temporarily, with indifferent improvements, under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done, and the speculation accomplished, the lands were abandoned.

This was felt to be a serious evil, and Congress, in the law

under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation, but, in good faith, to appropriate it to his own use. In case of false swearing the pre-emptor was subject to a prosecution for perjury, and forfeited the money he had paid for the land; and any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of *bona fide* purchasers for a valuable consideration. It is contended by the plaintiff in error that Congress went further in this direction, and imposed also a restriction upon the power of alienation *after* the entry, and the last clause in the 12th section of the act is cited to support the position.

This section, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter-section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and, independently of the legislation of Congress, assignable. (*Threadgill* v. *Pintard*, 12 Howard, 24.) The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the pre-emption

laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners until the government should choose to issue the patent.

If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was, in good faith, the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject. *Judgment affirmed.*

NOTE.—A pre-emptor cannot sell his right to the land so as to give any rights to the purchaser, and such sale will extinguish his own right to enter the land. *Quinn* v. *Kenyon*, 38 Cal., 499; *Moore* v. *Besse*, 43 Cal., 511.

A conveyance of the land before proof and payment have been made, is void. *Morgan* v. *Curtenins*, 4 McLean, 366; *Moore* v. *Jordan*, 14 La. Ann., 414. And if possession is given under such conveyance, it can be recovered back by the pre-emptor. *Seaton* v. *Sharkey*, 3 La. Ann., 332.

A mortgage given on the land before proof and payment have been made, is void. *Strong* v. *Rachel*, 16 La., 232; *Brewster* v. *Madden*, 15 Kans., 249. A levy and sale under a mortgage executed before proof and payment have been made, is a nullity. *Penn* v. *Ott*, 12 La. Ann., 233. But a mortgage given on the day of entry, to secure the payment of a land warrant, with which the land was entered, is valid. *Watterson* v. *Kirkwood*, 8 Kan., 463; *Jones* v. *Tainter*, 15 Minn., 512.

In California it has been held that a mortgage given by the pre-emptor, either before or after he filed his pre-emption claim, is valid, and may be enforced after proof and payment have been made. *Clark* v. *Baker*, 14 Cal., 612; *Christy* v. *Dana*, 34 Cal., 548, and 42 Cal., 174. But if the levy is made before such proof and payment, the purchaser at such sale acquires no title, as prior to proof and payment, the pre-emptor had no title to be levied upon. *Kenyon* v. *Quinn*, 41 Cal., 325; *Harrington* v. *Sharp*, 1 Green (Iowa), 131.

If a person entitled to pre-empt, sells the land to another, and takes a mortgage, payable when the grantor obtains title from the United States, but, by reason of such sale, he could not perfect his title, and his grantee goes on and obtains a title in his own name, he will not be

released from paying the mortgage, but he may deduct from it the amount it cost him to enter the land. *Snow* v. *Ferrea*, 45 Cal., 195.

In Iowa it has been held that a pre-emption claim may be sold the same as other claims on the public lands; *Bowers* v. *Keescher*, 14 Iowa, 301; and the seller has an equitable vendor's lien on the land for the purchase money, which can be enforced after the grantee has entered the land under the pre-emption law. *Pierson* v. *David*, 1 Iowa, 23.

In Illinois it has been held that the pre-emption law did not prohibit the pre-emptor from selling the land before entry; that it was the right to pre-empt that could not be sold; that, should the pre-emptor sell the land with covenants of warranty, and afterwards make proof and payment for the land, the title acquired will inure to the benefit of his grantee, discharged of the widow's right of dower. *Wooley* v. *Magie*, 26 Ill., 525. But a release of title without warranty, previous to entry, ceases as against the pre-emptor so soon as the entry is made. *Phelps* v. *Kellogg*, 15 Ill., 131.

A contract by which it was agreed that one of the parties should enter a tract of land under the graduation act of August 4, 1854, in his own name, but for the joint use and benefit of both parties, is invalid, as against the policy of the law, which is shown by the affidavit required when the entry is made. *Smith* v. *Johnson*, 37 Ala., 633.

The act of July 15, 1870, allowing pre-emptions on the "Osage Diminished Reserved Lands," does not prohibit a sale of the land previous to proof and payment. *Foster* v *Brost*, 11 Kan., 350.

The act of March 3, 1851, authorizing pre-emptions on the land embraced within the "Bastrop Grant," does not prohibit the sale of the land by the pre-emptor previous to entry. *Richards* v. *Emswiler*, 14 La. Ann., 658.

JOHN P. HARKNESS and MARIA, his wife, Appellants, *v.* ISAAC UNDERHILL.

December Term, 1861.—1 Black, 316; 4 Miller, 479.

Fraud in obtaining pre-emption certificates.—Lapse of time.

1. An agreement between two to obtain a pre-emption entry of the public lands by a simulated settlement which was a fraud on the land office, cannot be the foundation of a suit in equity by a party claiming under this contract to get a decree for the legal title.
2. Where one of the parties to the fraudulent agreement does afterwards make an actual and *bona fide* settlement, and claims a pre-emption right under it, the land office was right in setting aside the first and fraudulent entry in favor of his claim.
3. A bill in equity brought by a purchaser of the first claim, sixteen years after the patent was issued under the second, and accompanied with possession in the hands of a subsequent purchaser, comes too late.

APPEAL from the circuit court for the northern district of Illinois. The case is stated in the opinion.

Mr. Williams for appellants.

Mr. Carlisle and *Mr. Webb* for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

In the winter or spring of 1832, Isaac Waters and Stephen Stillman agreed to cultivate and improve the east half of the southeast quarter of section four, a portion of which is in controversy in this suit. This arrangement was made in view of the probability that Congress would, at its then session, pass a pre-emption law. It was further stipulated that Waters should make the necessary proof to obtain the pre-emption. As was anticipated the act of April 5, 1832, was passed, allowing "to actual settlers, being housekeepers," a pre-emption to enter a half-quarter-section to include his improvement. Waters went on the land, made a slight improvement for the purpose of cultivation, erected a temporary hut, or rather a pen, put some furniture in it, and he, with a part of his family, went into the hut, staid there a couple of days, and then returned to his residence in the village of Peoria, where he resided, and continued to reside. He was a substantial resident of the village, having a house, home, and family there.

The half-quarter-section adjoined the village property. Waters made an affidavit in September, 1832, that he was an actual settler and housekeeper on the land. He does not say at what time, but he applied to enter under the provisions of the act of April 5, 1832. He also procured the affidavit of one Trail, who swore that Waters was an actual settler and housekeeper on the half-quarter-section.

In July, 1833, Waters, in a written agreement with Stillman and Wm. A. Stewart, recited the terms on which he and Stillman agreed to improve the land, to wit: That the entry was to be made for their joint benefit on the proof furnished by Waters. Stewart, at the date of the agreement, stipulated to pay Stillman's moiety of the purchase-money, and Waters was bound to convey to Stewart and Stillman one-half of the eighty acres: and it appears by a covenant, dated July 2, 1835, executed by Waters to Pettingal and Walcott, that Waters' portion was the western forty acres, which he bound himself to convey to Pettingal and Walcott, they being purchasers from Waters. Waters soon thereafter died, leaving a widow and children, and they entered the

half-quarter-section, in the name of Waters, at the land office at Quincy, August 7, 1835. The entry stood in this condition till May, 1838, when the Commissioner of the General Land Office informed the register and receiver at Quincy that, Stephen Stillman's heirs having applied to them to enter the half-quarter-section, containing eighty acres, and having adduced evidence to the commissioner tending to prove that Waters went on the land into a log-pen, without a roof, and staid there only one night; furthermore, that the affidavits of Waters and Trail being evasive, and not stating that Waters was an actual settler on the 5th of April, 1832, the register and receiver were, therefore, instructed, that if they believed the facts, as respects the frauds practised to obtain the entry in Waters' name, to treat it as void, for fraud, and allow Stillman's heirs to enter the land, and this was accordingly done. The entry in Stillman's name was made under the occupant law of 1834.

We concur with the commissioner's directions, and the finding of the register and receiver, that the proceeding of Waters was a fraudulent contrivance to secure the valuable privilege of a preference of entry. It was an attempt to speculate on his part, and also on the part of Stillman his co-partner, by fraud and falsehood. They both knew equally well that Waters was no actual settler on the public lands at any time, and that the affidavits of Waters and Trail were false.

The principle ground on which the bill is founded assumes that the complainant, as assignee of Waters' heirs, is entitled to a decree against the respondent, because his title was derived, through Stillman, and that Stillman came into possession under Waters, and therefore Stillman's assignee cannot dispute the title of him under whom he held possession, according to the doctrine maintained by this court in the case of *Thredgill* v. *Pintard*, (12 How., 24.)

In Thredgill's case the transaction was fair, and obviously honest. The consideration between the parties was full and undoubted; their contracts bound them. But in this case there was no legal contract between Stillman and Waters. They combined to defraud the government; their agreement was contrary to public policy, because it was intended by contrivance to take the land out of the market at public sale—a cherished policy of the government. Such an agreement can have no standing in a court of justice.

But there is another defense equally conclusive. The bill seeks the legal title from Underhill; he holds under a patent, dated in 1838; he purchased in 1841, and has been in uninterrupted possession ever since. This suit was brought in 1854. In the meantime, the land sued for has been partly laid off into lots, and become city property; yet, Waters' claim lay dormant after his entry was set aside at the General Land Office for eighteen years, and fourteen years after the patent in Stillman's name was issued, and the land conveyed to Underhill by Wren. Underhill, and those holding under him, have held possession from 1841 to the time when this suit was brought: and, in the meantime, the land had greatly increased in value, and changed in its circumstances. These facts present a case on which a court of equity cannot decree for the complainant, if there was no other defense.

The question is again raised, whether this entry, having been allowed by the register and receiver, could be set aside by the commissioner. All the officers administering the public lands were bound by the regulations published May 6, 1836. 2. L. L. & O., 92. These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court.

This question has several times been raised and decided in this court, upholding the commissioner's powers. *Garland* v. *Winn*, (20 How., 8); *Lytle* v. *The State of Arkansas*. (22 How.)

For the reasons above stated, it is ordered that the decree of the circuit court be affirmed.

WARREN v. VAN BRUNT.

October Term, 1873.—19 Wallace, 646.

1. Where two persons, before a public survey of it, made a settlement in Minnesota on the same forty acres of land (a quarter of a quarter-section and the smallest legal subdivision allowed by statute), which settlement was *in point of fact* made at the *same time*—a joint settlement therefore—the circumstance that in his declaratory statement one of the settlers has stated that his settlement was made on a day anterior to the day which the other in his declaratory statement fixed as the date of his, is not a circumstance which will induce this court to reverse a decision of the register and receiver of the land office, affirmed by the Secretary of the Interior, awarding the tract to him

who the other alleges made the later settlement; there being no fraud, imposition, or mistake in the case. The court will regard the facts of the case, not the allegations of the parties.

2. Where two joint settlers on such a piece of land built from joint means and for a time jointly occupied a house there, which house (on a misunderstanding between them and the running of a line apportioning the land between them) was found to be on the land of one who now removed from and remained away from the land for several months, leaving the other in possession of the house, not as his tenant, but as part owner, and till he (the one on whose land it was) could pay to the other half the sum which its erection had cost, and then, on payment of this money, evicted the co-settler and put his own tenants in, (he himself occupying a wholly different forty acres, while the co-settler remained in effect on the old tract, and built and afterwards occupied a house for himself and family on it): *Held*, on a bill which set up a superior right of pre-emption to the whole forty acres, and not an equitable right to a joint ownership, or an ownership to part as settled by the dividing line, that this court would not reverse a decision of the register and receiver, affirmed by the Secretary of the Interior, which on a similar claim by the party who had removed awarded the whole to the other party who with his family remained.[1]

3. A party cannot set up in his replication a claim not in any way made in his bill, and the granting of which he asks in his replication only in the event that the case made in his bill fails.

4. An entry of the public land by one person in trust for another being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made.[2]

ERROR to the Supreme Court of Minnesota.

This was a contest between two pre-emption claimants, Warren on the one hand and the representatives of Van Brunt, deceased, on the other, for the ownership of the southeast quarter of the northeast quarter-section 13, township 108 N., R. 27 W. (forty acres), in the State of Minnesota.

These last had the legal title under a patent from the United States, issued upon the claim of Van Brunt. Warren, alleging that he had an elder and better right of pre-emption, sought by his action in the court below to charge the representatives of Van Brunt as his trustees, and to compel them to convey to him the title they acquired by the patent.

The case was decided below upon facts found by the court and stated in the record. No exception was taken to the finding, and the question presented, therefore, for the determination of this court was, whether upon the facts as found there was error in the

decree. These facts were substantially as follows: Warren and Van Brunt being each in May, 1853, and thereafter until the death of Van Brunt, legally competent to avail themselves of the pre-emption laws of the United States, in the said month jointly selected for occupancy about two hundred and eighty acres of *unsurveyed* public lands in Minnesota, to which the Indian title had been extinguished. (This was, of course, meant to correspond with seven tracts of forty acres each, *i. e.*, seven quarters of quarter-sections.) They settled upon the forty acres in dispute, and after ploughing and planting two or three acres proceeded with their joint means and labor to erect thereon a house for a residence, into which they moved with their families in June. They occupied this house together until the 18th of July, when, a difficulty having arisen between them, a contract of partition was entered into, by which, after establishing a dividing line which ran diagonally across the premises in controversy and through the ploughed lands, it was agreed that Warren should have the sole and exclusive use of all the lands selected for occupancy situated on the east side of the line, and Van Brunt of all on the west. The house they had built was on the part set off to Warren, but by the agreement Van Brunt was to have the exclusive use of it until May 1, 1854, when, on the payment to him of one-half its cost, he was to surrender the possession to Warren for his exclusive use thereafter. Upon the execution of this contract Warren went with his family to the town of Mankato, a town in the neighborhood of the two hundred and forty acres of land, but not on any part of it, leaving Van Brunt in the house. Soon after, and within a reasonable time, he began the erection of a new house on a part of the premises set off to him, adjoining the disputed property, into which he moved in the autumn of 1853 with his family. Van Brunt continued to occupy the first house in accordance with the terms of the contract of partition until May 1, 1854, when Warren, having paid him for one-half its cost, evicted him by legal proceedings. After his eviction he went into an abandoned "claim-shanty" on the part of the premises set off to him, and remained there from two to four weeks, during which time he erected a new house upon the disputed property, but on his side of the dividing line. As soon as this house was completed he moved into it with his family, and resided there until his death, on the 5th of January, A. D. 1856. His family occupied the same house as their residence after his death until

their title was perfected under his claim. In 1853 and 1854 he ploughed and cultivated about twenty acres of the land occupied by him, seventeen of which were on the disputed forty. In 1854 and 1855 he ploughed a few acres more, and cultivated all his improved lands. In 1855 he inclosed all his improvements with a fence, and dug some ditches. In addition to his house he put up on the disputed property a large corn-crib, a cow-house, and other outbuildings.

After the eviction of Van Brunt from the first house, Warren moved into it and resided there until the autumn of 1854. He then went back to the house he built after the partition, and remained there until after Van Brunt's heirs perfected their title. He cultiuated and improved his lands upon the east of and up to the agreed division line, by fencing, ploughing and planting, and kept tenants in the first house all the time after he left it until the commencement of the action in the court below. Neither of the parties disputed the right of the other to occupy and cultivate, up to the line of division, until after the title of the Van Brunt heirs was perfected.

The township lines were surveyed through the public lands, which included the premises in dispute, in 1854, and the subdivision lines in 1855. When the township lines were run, Warren was residing with his family in the first house, and his improvements on the disputed forty, including the house, were then equal to, if not greater in value, than those of Van Brunt.

On the 19th July, 1855, Van Brunt filed in the land office his declaratory statement under the pre-emption laws, claiming the right to enter and purchase the north half of the southeast quarter and south half of the northeast quarter, section 13, T. 108 N., R. 27 W., containing one hundred and sixty acres. His claim included the forty acres in dispute. In his statement, he gave the *4th of June*, 1855, *as the date of his settlement*.

It appeared from the pleadings, and the statements of the counsel for the plaintiff in the argument, that in December, 1855, Warren filed his declaratory statement, also claiming the right under the pre-emption laws to enter and purchase the disputed premises, and the northwest quarter, southwest quarter, and south half of the northwest quarter, section 18, T. 108 N., R. 26 W., in all one hundred and sixty acres. He gave the date of *his settlement as November 17th*, 1853.

On the 7th March, 1856, Warren served a notice upon the

widow and administratrix of Van Brunt, that he should contest her claim to the pre-emption of the forty acres in controversy, and in consequence of this notice, both claimants appeared before the register and receiver of the land office, and produced and examined their witnesses. After a full hearing, these officers were unable to agree upon a decision, and the papers and proofs were thereupon sent to the Commissioner of the General Land Office, who, on the 4th of April, 1857, decided in favor of the Van Brunt claim. Warren appealed to the Secretary of the Interior, who, on the 31st of October, A. D. 1857, affirmed the decision of the commissioner. On the 15th of May, 1860, a patent was issued to the heirs of Van Brunt for the whole one hundred and sixty acres claimed by him. In January, 1857, Warren received a patent for the one hundred and twenty acres claimed by him in section 18, and in February, 1865, filed a bill in one of the State courts of Minnesota to recover from Van Brunt's heirs the disputed forty acres.

The bill prayed a decree that Van Brunt's representatives should convey to Warren the *whole forty acres*.

The answer—which mentioned as part of a history of things which it gave, that the parties had divided their claims by running a line, which line they supposed, when they made it, would correspond with the east line of the forty acres, as that line would be laid down by the government survey—resisted this claim of the plaintiff, and asserted title in the whole forty acres in Van Brunt's representatives.

The replication, denying that the division line as thus agreed on gave Van Brunt any title to the forty acres, thus continued:

"And the plaintiff prays, in addition to the prayer of original complaint, that, in case the court should not find for the plaintiff, that he is entitled to a decree for a release of the *whole* disputed forty acres, that then the court may ascertain *how the said alleged division line divides said forty acres*, and that the defendants, on terms of payment of the original cost of the same, be decreed to convey *so much thereof as may be found to have been assigned to him, to the plaintiff*."

The Supreme Court of Minnesota, to which the case finally got, adjudged the title to be in the heirs of Van Brunt, and Warren brought the case here on error.

Messrs. M. S. Wilkinson and *C. K. Davis* for the plaintiff in error.

1. Warren, in his declaratory statement, dates his settlement as of November 17th, 1853. Van Brunt does not pretend that *his* was made prior to June 4th, 1855. Warren's settlement was thus anterior to Van Brunt's. Where two or more persons have settled on the same quarter-section, the right of pre-emption belongs to him who has made the first settlement.

2. If, in this view of the case, Warren is not entitled to the whole forty acres, a joint entry should have been allowed by the land department. There is nothing in the pre-emption laws which forbids a joint settlement, declaration and purchase. The admitted rule, "that where two or more persons have settled upon the same quarter-section, each shall be permitted to enter his improvement as near as may be by legal subdivisions," is very well so far as it goes, but it will not apply where both claimants have their improvements on the same quarter of the quarter-section, or forty acres, the smallest legal subdivision. In such a case, exact justice would seem to require that they enter jointly the whole. (Opinion of the Secretary of the Interior, *Laughton* v. *Caldwell*, 1 Lester's Land Laws, p. 387, Nos. 430–431.)

3. Finally, the very least that Warren is entitled to, is the part of what now turns out to be the quarter of a quarter-section; that would fall to him by giving effect to the dividing line agreed on by the parties before the government survey. That is what he asks for as an alternative.

Messrs. J. M. Carlisle and *J. D. McPherson contra.*

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court.

When Warren and Van Brunt made their settlement upon the lands in 1853, they acquired no right of pre-emption, as the act of Congress then in force only gave that right to settlers upon lands in the then Territory of Minnesota which had been surveyed. (5 Stat. at Large, 455, § 10.) On the 4th of August, A. D. 1854, the provisions of the pre-emption act were extended to unsurveyed lands in that territory; but it was further provided that if, when the lands were surveyed, it should appear that two or more persons had settled upon the same quarter-section, each should be permitted to enter his improvements as near as might be by legal subdivisions. (10 Stat. at Large, 576.)

There is no legal subdivision of the public lands less than a quarter of a quarter-section, or forty acres, except in the case of fractional sections. The lands in controversy, therefore, could not have been subdivided for the purposes of entry and purchase. The forty acres must be taken as a whole or not at all.

Warren and Van Brunt each claimed the right to purchase the whole. There could be no entry by either until the questions arising between them had been settled.

To meet such a case, the act of Congress under which they each made claim, provided that the register and receiver of the land district in which the land was situated should make such settlement, subject to an appeal to, and revision by, the Secretary of the Interior. (5 Stat. at Large, 455, § 11; 9 Stat. at Large, 395, § 3.)

The Commissioner of the General Land Office exercised a supervision over this action of the register and receiver under his general powers in respect to private land claims and the issuing of patents. (5 Stat. at Large, 107, § 1: *Barnard's Heirs* v. *Ashley's Heirs*, 18 How., 44.) The issue of the patent upon the award of these officers was final and conclusive as between the United States and the several claimants. It passed the legal title to the patentee. The remedy of the defeated party, if any thereafter, was by proceeding in the courts against the patentee or those claiming under him.

It is claimed on the part of the defendants in error that the decision of the government officers in this case is conclusive as between the claimants themselves, inasmuch as there was an actual submission of the controversy by both, and the court has found that there was no fraud, unfairness, or misconduct in the hearing or in the production of the testimony, either on the part of Van Brunt or his heirs, or the several officers who were called upon to act.

This question has recently been fully considered by this court, in the case of *Johnson* v. *Towsley*, (13 Wallace, 72), and it was there held (page 86) that "when those officers decided controverted questions of fact, in the absence of fraud or impositions, or mistake, their decision on those questions will be final," but (page 87) that "it was the right of the proper courts to inquire, after the title had passed from the government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the

public lands, the party holding that title should hold absolutely as his own or as trustee for another." We are satisfied with this ruling, and this leads us to inquire whether, upon the facts as found by the court, the officers of the government did err in awarding the patent to Van Brunt. The record does not disclose the facts found by the officers.

It is first contended by Warren that the patent should have been issued to him, because his settlement upon the disputed premises was, both in fact and by the declaratory statements of the respective parties, anterior to that of Van Brunt, and because by the act of Congress the first settlement gives the better right. It is not important for us to know what the claims of the parties have been. We must look to the facts as they actually existed, and from these it appears that neither of the parties had an advantage over the other by reason of a prior settlement. They both went upon the premises at the same time and, for a while, their occupancy was joint. After the partition, Van Brunt remained in the house alone. He was there in no respect as the tenant of Warren, but by reason of his right as part owner. His short absence after his eviction upon his lands adjoining, cannot be considered an abandonment of his possession, for he must have been all the time at work upon his new house, which was finished and ready for occupation in from two to four weeks. Warren was absent at Mankato, after the partition, from July until October, and he did not actually reside himself on the disputed forty acres many months. He had, therefore, no claim superior to that of Van Brunt on account of his possession.

It is next insisted that a joint entry of the forty acres by the two should have been permitted. No such demand was made upon the government by Warren. He claimed the right to enter the whole, and upon that claim the parties went to a hearing. He might have asked to make his entry jointly with Van Brunt, but he did not. He is concluded by his election made at the time. Having been defeated upon his claim as made, he cannot, in the absence of fraud or surprise, come into court and ask relief upon another which he might have urged then. Besides, he asks no such relief in his bill which is the foundation of the present proceeding. He there claims a superior right of pre-emption to the whole, and not an equitable right to a joint ownership.

It is again insisted that a decree should have been entered in

favor of Warren, charging the heirs of Van Brunt as his trustees for all that part of the premises situated on the east side of the partition line. This claim was not made in the bill; but the contract of partition having been set out in the answers for the purpose of explaining the character of the occupancy of Van Brunt, Warren asked in his replication to be allowed the benefit of it in case he failed to maintain his right to the whole. He was willing to repudiate the contract if by so doing he could get an advantage, but if he failed in that, insisted upon its enforcement. But such a contract cannot be enforced to any extent. The pre-emption laws provided, at the time of this entry and purchase, that before any person should be allowed to enter lands upon a claim for pre-emption he must make oath that he had not directly or indirectly made any agreement or contract in any way or manner with any person by which the title he might acquire by his purchase should enure in whole or in part to the benefit of any person except himself. Forfeiture of title to the land purchased and the money paid for it was made the penalty of false swearing in this particular. An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made a court of equity will not decree that it was. All contracts in violation of this important provision of the act are void, and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. (*St. Peter Co.* v. *Bunker*, 5 Minnesota, 199; *Evans* v. *Folsom*, 5 Minnesota, 422; *Bruggerman* v. *Hoerr*, 7 Minnesota, 343; *McCue* v. *Smith*, 9 Minnesota, 259.) We are satisfied with these decisions.

In our opinion there was no error in the decision of the government officers, or in the decree of the Supreme Court of Minnesota.

Decree affirmed.

1. Where two settlers reside on the same subdivision of public land, both being qualified and having a right of pre-emption to the land, a mutual agreement between them that one of them shall enter the land under the law and then convey to the other settler his portion, will be enforced in a court of equity. *Snow* v. *Flannery*, 10 Iowa, 318; *Rose* v. *Treadway*, 4 Nevada, 455; *Treadway* v. *Wilder*, 8 Nevada, 91; *Hamilton* v. *Fowlkes*, 3 Barb. (Ark.), 340.

2. Such contracts will not be enforced. *Marston* v. *Rowe*, 43 Ala., 271; *Thurston* v. *Alva*, 45 Cal., 16; *Houston* v. *Walker*, 47 Cal., 484; *Brake* v. *Ballou*, 19 Kans., 397; *Wilkinson* v. *Mayfield*, 27 Miss., 542; *Miller* v. *Davis*, 50 Mo., 572. And money paid on such illegal contracts cannot

be recovered back. *St. Peter Co.* v. *Bunker*, 5 Minn., 192. But if after entry the contract is confirmed by receiving the balance of the purchase-money, it will be enforced. *May* v. *Symms*, 20 Ill., 95. Or if a conveyance is executed after entry it will not be set aside. *Ainsworth and Stone* v. *Miller and Miller*, Western Jurist, August number, 1878.

If one get the legal title under such a void contract to hold as security for a debt, when the debt is paid a court of equity will decree a reconveyance. *Kiser* v. *Lock*, 9 Ala., 269. Or if one advance the money to a pre-emptor to pay for the land upon an agreement that he should have one-half of the land, and the certificate of entry is assigned to him, and he obtains the patent in his own name, he will be decreed to convey one-half of the land to the pre-emptor. *Brewer* v. *Brewer*, 19 Ala., 481.

JOHNSON *v.* TOWSLEY.

December Term, 1871.—13 Wallace, 72.

1. The question of the conclusiveness of the action of the land officers in issuing a patent on the rights of other persons reconsidered and former decisions affirmed.
2. The tenth section of the act of June 12th, 1858 (11 Stat. at Large, 326), which declares that the decision of the commissioner shall be final, means final as to the action of the Executive Department.
3. The general proposition is recognized that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive.
4. Under this principle the action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings, where by the rules of law the legal title must prevail.
5. But courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both judicial and executive action, founded in fraud, mistake, or other special ground of equity, when private rights are invaded.
6. In this manner the most solemn judgment of courts of law have been annulled, and patents and other important instruments issuing from the crown or other executive branch of the government have been reformed, corrected, declared void, or other appropriate relief granted.
7. The land office; dealing as it does with private rights of great value in a manner particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and necessity of this jurisdiction.
8. The decisions of this court on this subject establish :
   i. That the judiciary will not interfere by mandamus, injunction,

or otherwise, with the officers of the land department in the exercise of their duties, while the matter remains in their hands for decision.

ii. That their decision on the facts which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts.

iii. But that after the title has passed from the government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

9. In deciding this question, if it appears that the party claiming the equity has established his right to the land to the satisfaction of the land department in the true construction of the acts of Congress, but that, by an erroneous construction, the patent has been issued to another, the court will correct the mistake. *Minnesota* v. *Bachelder* (1 Wallace, 109,. *Silver* v. *Ladd* (7 *Id.*, 219.)

10. The fourth section of the act of March 3d, 1843, concerning two declaratory statements of the same pre-emptor, is confined to pre-emptions of land subject to private entry.

11. The fifth section of that act relating to lands not proclaimed for sale, does not forfeit the pre-emptor's right absolutely, when he has failed to make his declaratory statement within three months, but it gives the better right to any one else who has made a settlement or declaratory statement on the same land, before the first settler has made the requisite declaration.

12. Therefore, a declaratory statement on such land is valid, if made at any time before another party commences a settlement or files a declaration.

ERROR to the Supreme Court of Nebraska, the case being this: By an act of Congress, approved September 4th, 1841 (5 Stat. at Large, 455), and entitled, "An act to appropriate the proceeds of the public lands, and to grant pre-emption rights," it was enacted:

"SECTION 10. That from and after the passage of this act, every person &c., who, since the 1st day of June, A. D. 1840, has made or shall hereafter make a settlement in person on the public land * * * which has been or shall have been surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be and is hereby authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding 160, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: No person shall be entitled to more than one pre-emptive right by virtue of this act," &c., &c.

"SECTION 11. That when two or more persons shall have settled on the same quarter-section of land, the right of pre-emption shall be in him or her who made the first settlement, &c.; and all questions as to the right of pre-emption arising between different settlers *shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revison by the Secretary of the Treasury of the United States.*"

"SECTION 14. That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

"SECTION 15. That whenever any person has settled or shall settle and improve a tract of land, *subject at the time of settlement to private entry*, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof, and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

A subsequent act, that of March 3d, 1843, (5 Stat. at Large, 620), entitled "An act to authorize the investigation of alleged frauds under the pre-emption laws, and for other purposes," thus enacts:

"SECTION 4. That where an individual has filed, under the late pre-emption law, his declaration of intention to claim the benefits of said law for one tract of land, it shall not be lawful for the same individual at any future time, to file a second declaration for another tract.

"SECTION 5. That claimants under the late pre-emption law, for land *not yet proclaimed for sale*, are *required* to make known their claims, in writing, to the register of the proper land office, * * * *within three months from the time of the settlement*, * * * giving the designation of the tract, and the time of settlement; *otherwise his claim to be forfeited*, and the tract awarded to the next settler, in the order of time, on the same tract of land, who *shall have* given such notice and otherwise complied with the conditions of the law."

Finally came an act of June 12th, 1858. (11 Stat. at Large, 326.)

"SECTION 10. That the 11th section of the act of Congress approved 4th September, 1841, entitled 'An act to appropriate the proceeds of the public lands, and to grant pre-emption rights,' be so amended that appeals from the decisions of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be *final*, unless appeal therefrom be taken to the Secretary of the Interior."

With these provisions of law in force, one Towsley, on the 15th of June, 1858, settled, as he alleged, on the W. ½ S. W. quarter-section 3, township 15 N., range 13 east, lying near the city of Omaha, and made improvements upon the same; and *on the 4th of February*, 1859, filed with the register of the land office his declaratory statement of an intention to claim the land under the provisions of the act of September 4th, 1841; claiming his settlement from June 15th, 1858. On the 5th of October, 1860, one Johnson, also setting up a settlement, improvement, &c., filed a declaratory statement of his intention to pre-empt the same land under the act of 1841.

The same Towsley had previously, to wit, on the 2d of April, 1858, filed a declaratory statement giving notice that he had settled, March 25th, 1858, upon other land, described in the usual manner, and claimed a pre-emption right therein; which land had not yet *been offered at public sale and thus rendered subject to private entry*. From this land he withdrew claim early in the following June, and waived all claim to it in favor of an opposing settler.

An investigation as to the respective rights of the two parties was had before the local office, which resulted in a decision in favor of Towsley. This decision was affirmed by the Commissmissioner of the General Land Office; and on the 20th of September, 1862, Towsley received a patent. The dispute between the parties being taken by appeal before the Secretary of the Interior, that officer, on the 11th of July, 1863, as appeared from a statement of the Assistant Secretary, decided in favor of Johnson, on the ground that Towsley, previously to filing his declaratory statement claiming the land in question, had filed a declaratory statement claiming the other lands.

After this, Johnson entered on the lands, and a patent was issued to him.

In this state of things Towsley, relying on his patent and on different acts of Congress regulating the public lands, filed his bill in one of the inferior courts of Nebraska, against Johnson and others, his grantees, to compel them to surrender their title to him, the existing evidence of which cast a cloud on his own. The court in which the bill was filed decreed such a surrender, and the Supreme Court of the State on appeal affirmed that decree. Johnson now brought the case here under the 25th section of the Judiciary Act of 1789; or, if the reader prefer so to consider, under the 2d section of the act of February 5th, 1867, re-enacting with some change that so well-known section. (The reader may see the two acts arranged in parallel columns in *Trebilcock* v. *Wilson*, 12 Wallace, 687.)

Three questions arose here:

1. Whether, conceding that the courts of Nebraska had jurisdiction in the case, this court had any under the Judiciary Act of 1789 or 1867.

2. Admitting, upon the concession stated, that it had, whether in view of the language of the 10th section of the act of June 12th, 1858 (quoted *supra*), as to the effect of decisions by the Commissioner of the General Land Office, in cases of contest between different settlers for the right of pre-emption, either of the courts below had any jurisdiction. Since if they had not, this court would have none now.

3. Whether, admitting that all three courts had jurisdiction, and that the matter was now properly here for review, the decision of the Supreme Court of Nebraska, affirming the validity of Towsley's patent, was correct.

Mr. Lyman Trumbull for the plaintiff in error.

I. A question of jurisdiction under the 25th section has been suggested in a case similar to this. But we rely more on other points, one of which includes merits. We assert, therefore, that—

II. The act of 1858, in plain terms makes the decision of the Commissioner of the General Land Office "final," unless appeal therefrom be taken to the Secretary of the Interior; when, of course, the decision of this officer must be equally so.

But independently of this, though courts of equity may interpose in cases of fraud, or to correct mistakes made in the disposition of the public lands by the officers charged with that duty, they cannot supervise the decisions of those officers when no fraud

or mistake is alleged, (*Wilcox* v. *Jackson*, 13 Peters, 511; *Lytle* v. *Arkansas*, (9 Howard, 333), other than in arriving at a wrong conclusion, after a full hearing of all the parties in interest.

The case of *Lytle* v. *State of Arkansas*, (22 Howard, 193), and *Garland* v. *Wynn*, (20 *Id.*, 8), arose under pre-emption acts prior to 1841, and before the law vested the land officers with authority to settle questions arising between different pre-emptors, or made their decisions final. In these cases, as well as in the subsequent ones of *Minnesota* v. *Bachelder*, (1 Wallace, 109), and *Lindsey* v. *Hawes*, (2 Black, 554), fraud and misrepresentation were alleged, and in most of them the proceedings before the land officers had been *ex parte*. In none of them had there been a decision between conflicting claimants after a full hearing on notice and final appeal to the Secretary of the Interior, as in this case.

III. But if this is not so, and if the ordinary courts can re-examine such cases as this, Towsley has no case.

1. He filed April 2d, 1858, his declaratory statement, giving notice that he had, on the 25th day of March preceding, settled upon certain lands—different from those he now claims—and would claim a pre-emption right therein. It was not until after this, to wit, the 15th of August, 1858, that he tendered his declaratory statement for the land in controversy. This alone is fatal to his case.

The prohibition of the 4th section of the act of March 3d, 1843, against filing a second declaration, is not limited to filings on lands which were subject to private entry, but extends as well to lands of the class in question which have not been proclaimed for sale, the only difference being that in the one case the law requires the declaratory statement to be filed within thirty days, and in the other within three months from the date of settlement. But the law prohibits the same individual who has filed a declaration claiming one tract of land, from afterwards filing a second declaration for another tract, as much in the one case as the other.

The section is not limited to declarations which had been filed at the date of its passage, but applies to every case where an individual "at any future time" shall offer to file a second declaration. If he "*has filed under the late pre-emption law*" for one tract of land, at the "future time," when he seeks to file a second declaration for other land, the second filing is invalid.

The same reason applies for confining a pre-emption to one filing on lands not proclaimed for sale as on those which had been.

To allow a pre-emptor to file as many declaratory statements on as many different tracts of land as he pleases, would put it in his power to keep the public lands from being taken and settled by others, which would be contrary to public policy as well as the statute. The policy of the government has always been to sell its lands to actual settlers, and not let them fall into the hands of speculators. Hence, it has often delayed proclaiming lands for sale that actual settlers might take them; but this policy would be thwarted if a single pre-emptor could file declaratory statements for as many tracts as he pleased.

2. But a stronger, and, we think, a plainly unanswerable argument against his case remains. By the 5th section of the act of June 3d, 1843, a claimant is required to file his declaratory statement "within three months from the time of the settlement; otherwise his claim to be forfeited, and the tract awarded to the next settler in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law." This is statute law, and imperative. Towsley neither filed nor offered to file his declaratory statement within the three months from the time of his settlement upon the land, and his claim as a pre-emptor thereby became forfeited. If, after having occupied the land nearly a year, he was at liberty to file a declaratory statement, asserting his settlement to have been within three months, then he could occupy the land indefinitely, and need never file his declaratory statement, and the law requiring him to do so within the three months becomes nugatory. No other individual could settle upon the land and pre-empt it, because Towsley, as soon as such an attempt should be made, would have it in his power to defeat him by filing a declaratory statement, dating his settlement, not at the time it was actually made, but at any time within three months which should be anterior to that of the other claimant. Towsley's declaratory statement, filed February 4th, 1859, claiming a settlement June 15th, 1858, was a nullity.

By the act of 1841, individuals settling on lands not proclaimed for sale were not required to file declaratory statements, and in case of dispute between pre-emptors, the right of pre-emption was declared to be in him who made the first settlement: but the act of 1843 declared the claim of the first settler forfeited unless

he filed a declaratory statement within three months from the time of settlement. Towsley having failed to file his declaratory statement as required by law, the land was properly awarded to Johnson, who was the next settler, and complied with the pre-emption laws.

[There were some other questions presented in the brief of the learned counsel, such as supposed defects in the bill, and whether on the evidence Towsley made the necessary settlement and owned the improvements, which this court declared were not within its cognizance. It was also argued that Towsley forfeited his right by entering into contracts, by which his title should enure to the benefit of others than himself, in violation of the 13th section of the act of 1841; but as the court considered that no such matter was put in issue in the pleadings, and that it could not be considered here, the reporter makes no further mention either of the questions or the matter referred to.]

Mr. J. M. Woolworth, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The jurisdiction of this court rests on two grounds found in the 25th section of the Judiciary Act, or, perhaps we should rather say, in the 2d section of the act of February 5th, 1867, which seems to be a substitute for the 25th section of the act of 1789, so far as it covers the same ground. The defendant in error relied on his patent, as conclusive of his right to the land, as an authority emanating from the United States, which was decided against him by the State court, and he relied upon certain acts of Congress as making good his title, and the decision of the State courts was against the right and title set up by him under those statutes. Undoubtedly the case is fairly within one or both of these clauses of the act of 1867, and the conclusiveness of the patent and the right of the plaintiffs in error claimed under the statutes must be considered.

The contest arises out of rival claims to the right of pre-emption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the Commissioner of the Land Office their action was affirmed, but on a further appeal to the Secretary of the Interior, the action of these officers was

reversed on a construction of an act of Congress, in which the secretary differed from them, and under that decision the patent was issued to Johnson.

It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which were passed upon by the register and receiver, by the commissioner, and by the Secretary of the Interior: and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties not only in the land department, but in the courts and everywhere else.

This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us: and the question being pressed upon our attention with an earnestness and fulness of argument which it has not perhaps before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject.

The statutory provision referred to is the 10th section of the act of June 12th, 1858 (11 Stat. at Large, 326), which declares that the 11th section of the general pre-emption law of 1841, shall "be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

The finality here spoken of applies in terms to the decision of the commissioner, and can only be supposed to attach to that made by the secretary by some process of reasoning, which implies the absurdity of making the decision, on appeal to the secretary, less conclusive than that made by the inferior officer. But the section under consideration is only one of several enactments concerning the relative duties, power, and authority of the executive departments over the subject of the disposition of the public lands, and a brief reference to some of them will, we think, show what was intended by this amendment. By the 1st section of the act to reorganize the General Land Office, approved July 4th, 1836, (5 *Id.*, 107), it was enacted that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining

to the surveying and sale of the public lands, * * * and the issuing of patents for all grants of land, under the authority of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States. In the case of *Barnard's Heirs* v. *Ashley's Heirs*, (18 Howard, 45), it was held that this authorized the commissioner to entertain appeals from the decisions of the register and receiver in regard to pre-emption claims, and it is obvious that the direct control of the President was contemplated whenever it might be invoked. Afterward, when the act of September 4th, 1841, was passed, which so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights, the 11th section provided that all questions as to the right of pre-emption arising between different settlers should be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and revision by the Secretary of the Treasury of the United States.

This provision, in the class of cases to which it referred, superseded the functions of the Commissioner of the Land Office, as revising officer to the register and receiver, and, so far as the act of 1836 associated the President with the commissioner, superseded his supervisory functions also. It left the right of appeal from the register and receiver to the Secretary of the Treasury direct as the head of the department. The 10th section of the act of 1858, so much relied upon by the plaintiffs in error, the operative language of which we have quoted, was clearly intended to remedy this defect or oversight, and to restore to the commissioner his rightful control over the matters which belonged to his bureau. In the use of the word *final* we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry in that department. But we do not see, in the language used in this connection, any intention to give to the final decision of the Department of the Interior, to which the control of the land system of the government had been transferred, any more conclusive effect than what belonged to it without its aid.

But while we find no support to the proposition of the counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain

matters arising in the course of its duties, the decision of that tribunal, within the scope of it authority, is conclusive upon all others. That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reasons of the limited powers of the court, or the essential character of the proceding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office. It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it, but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it they issue a second. In such a case as this have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights? Such is the case of *Stark* v. *Starrs*, (6 Wallace, 402), in which the patent was issued

to one party one day and to the other the day after, for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined, except by a court of equity? Which patent shall prevail, and what conclusiveness or inflexible finality can be attached to a tribunal whose acts are in their nature so inconclusive? So, also, the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, "a court of equity will," in the language of this court in the case of *Stark* v. *Starrs*, just cited, "convert him into a trustee of the true owner, and compel him to convey the legal title." In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers. (*Lytle* v. *Arkansas*, 22 Howard, 192: *Garland* v. *Wynn*, 20 *Id.*, 8; *Lindsey* v. *Hawes*, 2 Black, 559.)

Not only has it been found necessary in the interest of justice to hold this doctrine in regard to the decisions of the land officers of the United States, but it has been found equally necessary in the States which have had a system of land sales. Numerous cases are found in the courts of Kentucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title instead of the elder patent, by an inquiry into the priority of location, or some other equitable matter, or have compelled the holder of the title under the patent to convey, in whole or in part, to some persons whose claim rested on matters wholly anterior to the issuing of the patent. There is also a similar course of adjudication in the State of Pennsylvania, and we

doubt not cases may be found in other States. Several of the Kentucky cases have come to this court, where the principle has been uniformly upheld. (*Finly* v. *Williams*, 9 Cranch, 164; *McArthur* v. *Browder*, 4 Wheaton, 488; *Hunt* v. *Wickliffe*, 2 Peters, 201; *Green* v. *Liter*, 8 Cranch, 229.)

It is said, however, that the present case does not come within any of the adjudicated cases on this subject; that in all of them there has been some element of fraud or mistake on which the cases rested.

Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this court decided in the case of *Minnesota* v. *Batchelder* (1 Wallace, 109), and in the case of *Silver* v. *Ladd* (7 *Id.*, 219.) In this latter case, a certificate under the Oregon donation law, given by the register and receiver, was set aside by the commissioner, and his action approved by the secretary, and the action of each of these officers was based on a different construction of the act of Congress. This court held that the register and receiver were right; that the certificate conferred a valid claim to the land, and that the patent issued to another party by reason of this mistake, must enure to the benefit of the party who had the prior and better right. This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States, and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after

the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

In the case now under consideration, the complainant made his declaratory statement and proved his settlement to the satisfaction of the register and receiver, and they gave him a patent certificate. The defendant, Johnson, contested the complainant's right before these officers, and asserted that he was entitled to the pre-emption right for the same land, and when they decided in favor of Towsley, he appealed to the commissioner. This officer approved the decision of the register and receiver, and an appeal was taken by Johnson to the Secretary of the Interior. The secretary, or rather the assistant secretary, as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption for another tract of land, which he had voluntarily abandoned, and it is clear that but for his construction of the statute on that subject, Towsley would have received the patent which was awarded to Johnson.

We must therefore inquire whether the statute, rightly construed, defeated Towsley's otherwise perfect right to the patent, and this inquiry requires consideration of some of the features of our system of land sales.

One of these is that after the surveys are made in any given locality, so that the different tracts can be identified by the descriptions used in these surveys, they are not subject to sale by private entry at the land office until there has been a public auction, at which the lands so surveyed are offered to the highest bidder. The time and place of this sale and the lands offered for sale are made known by a proclamation of the President. The object of this public sale and of withholding the lands from private entry is undoubtedly to secure to the government the benefit of competition in bidding for these parcels of land supposed to be worth more than the price fixed by Congress, at which they may afterward be sold at private entry. But as the tide of emigration was

greatly in advance of these public sales, and indeed of the surveys, it was found that settlers who had made meritorious improvements were unable to secure the land on which they had settled without bidding at public auction against parties who took into consideration the value of the improvements so made, and who would get them by the purchase. To remedy this evil several of the earlier pre-emption laws were passed, and they only included settlements made prior to the passage of those laws. The act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed, but not open to private entry, as well as land which could be bought at private sale. It protected settlements already made, and allowed future settlements to be made with a right to pre-emption, which was a new feature in the pre-emption system. As, however, these settlements might now be made on lands subject to private sale, and the settler was allowed a year in which to make his entry and pay the money, the 15th section of the act required the settler on such lands to make a declaratory statement if he intended to claim a right of pre-emption, in which he should declare such intention and describe the land. This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale for the time allowed the settler to perfect his entry and pay for the land. But an experience of two years seems to have shown that this privilege of withdrawing particular tracts from private sale was subject to abuse by persons who filed declarations for several tracts when they could only receive one as a pre-emptor, thus delaying the sales and preventing others from settling on or buying, with a view to a purchase by themselves or friends when it became convenient to do so. To remedy this evil Congress, when it came to legislate again about the right of pre-emption, by the act of 1843, enacted by the 4th section "that where an individual had filed, under the late pre-emption law, his declaration of intention to claim the benefit of said law for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract." As the only declaration of intention required by the act of 1841 (which is undoubtedly the one referred to as "the late pre-emption law") was, both by its express terms and by the policy which dictated it, confined to pre-emptions of land subject to private entry, we entertain no doubt that this section was limited, in like manner, to that class of lands. As to lands not subject to private sale no declaration

of intention was required by the act of 1841, and the reference to such a declaration in the act of 1843 would be without anything on which to base it. This view is made still clearer by the fact that the next succeeding section of the act of 1843 does introduce distinctly, as a new and separate provision, the requirement that settlers on the land *not yet proclaimed for sale* are required to make a similar declaration, *within three months from the time of settlement*, on pain of forfeiting their pre-emption right in favor of the next actual settler, but making no provision whatever for the case of two declarations by the same party on different tracts of land. We are, therefore, of opinion that the effect of a double declaration in defeating the right of the pre-emptor to the tract which he finally claims to purchase is limited to lands subject, at the time, to private sale. The land in controversy in this suit was never subject to private entry, and the application of the principle by the secretary to Towsley's case was, as we think, a misconstruction of the law, through which his right was denied him.

But it is argued that if the pre-emption claim of Towsley was not governed by the 4th section of the act of 1843, it certainly was by the 5th section of that act, and as he did not file his declaration of intention within three months from the time of settlement, his claim was forfeited and gave him no right.

The record shows undoubtedly that his settlement commenced about eight months before he filed his declaration, and it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section. It declares that where the party fails to make the declaration within the three months his claim is to be forfeited and the tract awarded to the next settler in order of time on the same tract, who shall have given such notice and otherwise complied with the conditions of the law. The words "shall have given such notice," presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or

in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of the meaning.

We are of opinion that the decree of the Supreme Court of Nebraska must be *Affirmed.*

MR. JUSTICE CLIFFORD, dissenting:

I dissent from the judgment of the court in this case, upon the ground that the case is controlled by the act of Congress which provides that the decision of the Commissioner of the General Land Office shall be final unless an appeal is taken to the Secretary of the Interior. In my judgment the decree of the commissioner is final if no appeal is taken, and in case of appeal that the decision of the appellate tribunal created by the act of Congress is equally final and conclusive, except in cases of fraud or mistake not known at the time of the investigation by the land department.

MR. JUSTICE DAVIS took no part in the decision of this or the next case, being interested in the question involved.

NOTE.

At the same time with the preceding case was adjudged another from the same court with it, to wit, the case of

SAMSON *v.* SMILEY.

13 Wallace, 91.

The case of *Johnson* v. *Towsley*, *Held* applicable, although no patent certificate was issued to the claimant who showed the better right of pre-emption; the general principle being laid down that when a party is deprived of his right of pre-emption otherwise perfect, by a mistaken construction of the act of Congress by the land department, equity will relieve.

In this case the controversy had been between one Samson and a certain Smiley, and the register and receiver had decided in favor of Smiley. Samson accordingly brought the case here. The case differed, as this court considered, in no respect from the case just decided, but one, which was that when the register and receiver decided in favor of Smiley and against Samson, in the contest for the right of pre-emption to the land, they did not give him a patent certificate as they did to Towsley. The reason for this seemed to be that the contest between him and Samson was prosecuted immediately from the register and receiver's decision to the commissioner, and from the commissioner's decision affirming that of the register and receiver, to the secretary, so that there was no period, until the final decision of the latter, when either party could have been permitted to make the entry: but the record showed that, on a full and thorough investigation, all the officers of the land department decided that Smiley had established his right of pre-emption, and the secretary overruled this on the sole ground that he had filed a declaratory statement for another tract of land.

After argument by *Mr. Trumbull*, for Samson *et al.*, plaintiffs in error, and by *Messrs. M. H. Carpenter*, *J. M. Woolworth*, and *A. J. Poppleton*, *contra*, the judgment of the court was delivered by MR. JUSTICE MILLER, to the effect that the land in question, having never been subject to private entry, the construction of the statute made by the secretary was erroneous, and operated to deprive Smiley of his right, otherwise perfect, to the land, and to vest the legal title, which he ought to have received, in Samson. The case came, therefore, as the court considered, within the principle just decided in *Towsley* v. *Johnson*, and the judgment of the Supreme Court of Nebraska was accordingly

Affirmed.

SHEPLEY *et al. v.* COWAN *et al.*

October Term, 1875.—1 Otto, 330.

1. Whenever, in the disposition of the public lands, any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. Accordingly, where an act of Congress of 1812 directed a survey to be made of

the out-boundary line of the village of Carondelet, in the State of Missouri, so as to include the commons claimed by its inhabitants, and a survey made did not embrace all the lands thus claimed, the lands omitted were reserved from sale until the approval of the survey by the land department, and the validity of the claim to the omitted lands was thus determined.

2. Where a State seeks to select lands as a part of the grant to it by the eighth section of the act of Congress of September 4, 1841, and a settler seeks to acquire a right of pre-emption to the same lands, the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act, and cuts off all intervening claimants.

3. The eighth section of the act of September 4, 1841, in authorizing the State to make selections of land, does not interfere with the operation of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States are not in conflict with each other. Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had.

4. Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

5. Where a party has settled upon public land with a view to acquire a right of pre-emption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from settlement.

6. The rulings of the land department on disputed questions of fact, made in a contested case as to the settlement and improvements of a pre-emption claimant, are not open to review by the courts when collaterally assailed.

7. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties, founded upon their decisions. But, for mere errors of judgment upon the weight of evidence in a contested

case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.

ERROR to the Supreme Court of the State of Missouri.

The facts are stated in the opinion of the court.

Mr. John R. Shepley and *Mr. P. Phillips* for the plaintiff in error.

Mr. Montgomery Blair and *Mr. Britton A. Hill contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity, brought, according to the practice obtaining in Missouri, to settle the conflicting claims of the parties, arising from their respective patents, to a fractional section of land comprising thirty-seven acres and two-fifths of an acre, situated in that State. The plaintiffs assert title to the premises under a patent issued to William M. McPherson by the governor of the State, bearing date on the 27th of February, 1850, purporting to be for lands selected under the eighth section of the act of Congress of Sept. 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights" (5 Stat., 453), and the defendants claim title to the premises under a patent of the United States, bearing date on the 21st of July, 1866, issued to the heirs of Thomas Chartrand, upon an alleged pre-emption right acquired by a settlement of their ancestor.

The eighth section of the act of Sept. 4, 1841, declared that there should be granted to each State specified in its first section—and among them was the State of Missouri—five hundred thousand acres of land for purposes of internal improvement, the selection of the land in the several States to be made within their respective limits, in such manner as the legislature thereof should direct, but in parcels conformably to sectional divisions and subdivisions of the public surveys, and of not less than three hundred and twenty acres in each, from any public land, except such as was or might be reserved from sale by any law of Congress or proclamation of the President. Several acts were passed by the legislature of Missouri for the selection and disposition of the land thus granted. One of them, passed on the 10th of March, 1849 (Laws of Missouri of 1849, p. 64), authorized the governor of the State to dispose, at private sale, of so much of the land as then remained to be selected, and to issue to

the purchasers certificates, empowering them to locate the quantity purchased in conformity with the act of Congress. The purchasers were to inform the governor of the lands selected, and he was to notify the Secretary of the Treasury that the selections were made for the State; and, if approved by the secretary, patents were to issue to the purchasers.

Where the land selected in any instance contained less than three hundred and twenty acres, the governor was required, upon the request of the purchaser, and upon payment for the full amount, to relinquish the surplus to the United States. Of the certificates thus issued, one was held by William M. McPherson, and under it a selection was made by him of the premises in controversy. Of this selection the governor of the State informed the Secretary of the Treasury on the 15th of December, 1849, and requested his approval of it, at the same time relinquishing to the United States the surplus between the amount selected and three hundred and twenty acres. At that time the supervision of the land office had been transferred from the Secretary of the Treasury to the Secretary of the Interior, whose department was created in March of that year. The selection of McPherson was accordingly brought to the latter's attention, and was approved by him on the 17th of January following, subject, however, to any rights which may have existed at the time the selection was made known to the land officers by the agents of the State. On the 27th of February following, a patent of the State of Missouri for the premises was issued to McPherson by the governor.

Upon the title thus conferred the plaintiffs repose, and ask judgment in their favor.

In considering the validity of this title, the first question for solution is, whether the premises were then open to selection by the State; for whether the eighth section of the act of 1841 be construed as conferring a grant in præsenti, operating to vest the title in the State upon the selection of the land pursuant to its directions, notwithstanding the words of grant used are in the future tense—in that respect resembling the grant of the State of North Carolina to General Greene, which was the subject of consideration by this court in the case of *Rutherford* v. *Greene's Heirs*, reported in the 2d of Wheaton—or whether the section be considered as giving only the promise of a grant, and therefore requiring further legislation, or further action in some form of the govern-

ment to vest the title of the land selected in the State, as held, or rather implied, by the decision in the case of *Foley* v. *Harrison*, reported in the 15th of Howard, the same result must follow if the land were not at the time open to selection. If not thus open, the whole proceeding on the part of McPherson and the governor of the State to appropriate the land was ineffectual for any purpose. That the land was not thus open we think there is no doubt. The land was then claimed as part of the commons of Carondelet. The villages of St. Louis and Carondelet, on the acquisition of Louisiana in 1803, and for many years previously, claimed as commons certain lands adjoining their respective settlements. Those of St. Louis extended south of the village of that name, those of Carondelet to the north of its village; and a well known line was generally recognized as the boundary separating the commons of the two villages. That line commenced on the bank of the Mississippi at what is known as Sugar-loaf Mound, about four miles south of the settlement of St. Louis, and two miles north of that of Carondelet, and ran westerly to the common fields of Carondelet. It was contended, in the controversy which subsequently arose between the cities of St. Louis and Carondelet, that this line had been surveyed and marked by Soulard, a Spanish surveyor, previous to 1800, by order of the lieutenant governor of the upper province of Louisiana. Be that as it may, it is clear that from the acquisition of the country until June 13, 1812, the land south of this line was claimed and used by the inhabitants of Carondelet as within their commons. On that day Congress passed an act confirming to the inhabitants of these villages their claims to their common lands. (2 Stat., 748.) The act was a present operative grant of all the interest of the United States in the property used by the inhabitants of the villages as their commons; but it did not refer to the line mentioned, or designate any boundary of the commons, but left that to be established by proof of previous possession and use.

The act at the same time made it the duty of the deputy surveyor of the territory to survey the out-boundary lines of the villages so as to include the commons respectively belonging to them, and make out plats of the surveys, and transmit them to the surveyor general, by whom copies were to be forwarded to the Commissioner of the General Land Office and the recorder of land titles. No survey appears to have been made, as here directed, of the out-boundary line of the village of Carondelet, until the

year 1816; but its inhabitants claimed under the act the ownership and title of the land as part of their commons, up to the line mentioned on the north, as the same had been claimed and used by them previously. In 1816 or 1817, Elias Rector, a deputy surveyor, under instructions from his superior, made a survey of the commons, running the upper line about a mile below the line alleged to have been established by Soulard. Some years afterwards (in 1834), another deputy surveyor, by the name of Joseph C. Brown, was ordered by the surveyor general to retrace and mark anew the lines of this survey, and connect them with the surveys of adjoining public lands and private claims. This was accordingly done by him; and it would seem by various proceedings of the authorities of Carondelet that the survey thus retraced was at one time acquiesced in by them as a determination of the boundaries of their commons. They had a copy of it framed for the benefit of the town, and they introduced it in several suits with different parties as evidence of the extent of their claim. But at another time they denied the correctness of its northern line, which they insisted should be coincident with that alleged to have been run by Soulard. When St. Louis, in 1836, proceeded to subdivide her commons into lots down to the line of the survey, they gave notice, through a committee, that the lands below the alleged Soulard line were claimed as part of their commons: and, in 1855, Carondelet entered a suit against St. Louis for the possession of those lands. In the meantime the matter remained undetermined in the land department at Washington until the 23d of February of that year. During this period the Commissioner of the General Land Office repeatedly informed the local land officers that the tract was reserved from sale because it was claimed as part of the Carondelet commons, and on that ground their refusal to receive proofs of settlement from parties seeking to acquire a right of pre-emption was approved; and appropriate entries stating such reservation were made in the books of those officers. At one time (January, 1852) the Secretary of the Interior decided to have a new survey of the commons, and gave orders to that effect. The surveyor general for Missouri having asked instructions as to the manner of the survey, and stating that, in his opinion, the new survey should include the land in controversy, the secretary then in office, the successor of the one who had ordered a new survey, re-examined the whole subject, and recalled the direction for a new survey made by his predecessor, and held

that as the surveys of 1816 and 1834 had been executed by competent authority and approved, and were for years acquiesced in by the inhabitants of Carondelet, both they and the government of the United States were estopped and concluded by them; and that, in consequence, the survey of 1816, as retraced in 1834, should be sustained, excluding therefrom a tract which had been reserved for a military post. This was the final determination of the boundaries of the Carondelet commons by that department of the government to which the supervision of surveys of public grants was intrusted. A few days before this determination was announced, the suit mentioned, of the city of Carondelet against the city of St. Louis, was commenced to obtain possession of the lands below the Soulard line, over a portion of which the St. Louis commons had been extended. That suit was finally disposed of by the judgment of this court in March, 1862, affirming that of the Supreme Court of the State, to the effect that both the government and Carondelet were concluded by the surveys stated.

The act of 1812 contemplated that the out-boundary line of the village would be surveyed so as to include the commons claimed, in accordance with the possession of the inhabitants previous to 1803, and not arbitrarily, according to the caprice of the surveyor; and any line run by him was subject, like all other surveys of public grants, to the supervision and approval of the land department at Washington. Until surveyed, and the survey was thus approved, the land claimed by Carondelet was, by force of the act requiring the survey and the establishment of the boundaries, necessarily reserved from sale. It was thus reserved to be appropriated in satisfaction of the claim, if that should be ultimately sustained. Whenever in the disposition of the public lands any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. The allowance of selections by the States or of pre-emptions by individuals of lands which might be included within grants to others might interfere, and in many instances would interfere, with the accomplishment of the purposes of the government. A sale is as much prohibited by a law of Congress, when to allow it would defeat the object of that law, as though the inhibition were in direct terms declared. The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from sale or pre-emption lands which might, in the execution of the laws of Congress, fall within grants

to others; and therefore, in this case, until it was decided by the final determination of the Secretary of the Interior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale, and consequently from any selection by the State as part of its five hundred thousand acres granted by the act of Sept. 4, 1841.

But there is another view of this case which is equally fatal to the claim of the plaintiffs. If the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office in St. Louis, it was equally open from that date to settlement, and consequent pre-emption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of the State. In either case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not intended by the eighth section of the act of 1841, in authorizing the State to make selections of land, to interfere with the operations of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had.

Nor is there anything in this view in conflict with the doctrines

announced in *Frisbie v. Whitney*, 9 Wall., 187, and the *Yosemite Valley Case*, 15 *Id.*, 77. In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the pre-emption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands from sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a patent of the United States. Until such payment and entry the acts of Congress gave to the settler only a privilege of pre-emption in case the lands were offered for sale in the usual manner—that is, the privilege to purchase them in that event in preference to others.

But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent State selection in 1849.

His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if, in point of fact, the reservation had then ceased. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the commons of Carondolet. So soon as the claim was held to be invalid to this extent by the decision of this court, in March, 1862, the heirs of Chartrand presented anew their claim to pre-emption founded upon the settlement of their ancestor. The act of Congress of March 3, 1853 (10 Stat., 244), provided that any settler who had settled or might thereafter settle on lands previously reserved on account of claims under French, Spanish, or other grants, which had been or should thereafter be declared invalid by the Supreme Court of the United States, should be entitled to all the rights of pre-emption granted by the act of Sept. 4, 1841, after the lands were released from reservation, in the same manner as if no reservation had existed. With the decision declaring the invalidity of the claim to the land in controversy, all obstacles previously interposed to the presentation of the claim of the heirs of Chartrand, and the proofs to establish it, were removed. According to the decisions in *Frisbie* v. *Whitney*, and the *Yosemite Valley Case*, Congress might then have withdrawn the land from settlement and pre-emption, and granted it directly to the State of Missouri, or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs as against the United States would have been invaded by its action: but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs.

If the matter were open for our consideration, we might perhaps doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the land department to establish a right of pre-emption by virtue of the settlement and proceedings of their ancestor, or by virtue of their own settlement. Those proofs were, however, considered sufficient by the register of the local land office, by the Commissioner of the General Land Office on appeal from the register, and by the Secretary of the Interior on appeal from the commissioner. There is no evidence of any fraud or imposition practiced upon them, or that they erred in the construction of any law applicable to the case

It is only contended that they erred in their deductions from the proofs presented: and for errors of that kind, where the parties interested had notice of the proceedings before the land department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public land with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions: but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President. It may also be and probably is true that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at time, would have changed the action of the land officers: but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case, must be taken, when that ruling is collaterally assailed, as conclusive.

In this case, therefore, we cannot inquire into the correctness of the ruling of the land department upon the evidence presented of the settlement of Chartrand, the ancestor, or of his heirs. It follows that the patent issued by the United States, taking effect as of the date of such settlement, overrides the patent of the State of Missouri to McPherson, even admitting that, but for the settlement, the land would have been open to selection by the State. *Decree affirmed.*

NOTE.—In making an entry or other appropriation of public land, the statute under which the appropriation is made should be followed. In the case of *Wilson* v. *Mason*, 1 Cranch, 97, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "The mode of appropriation, then, which the law designates, has not been pursued; but it is contended that another course has been adopted, which equally produces all the objects designed to be effected by the location in the book of entries, and which, therefore, ought to be received as a sufficient substitute for an entry.

"The legislature of Virginia, when bringing her lands into the market,

had undoubtedly a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers, for the purpose of particularizing the general title acquired by obtaining a land warrant. The court is by no means satisfied by its power to substitute any equivalent act for that required by the law."

In the sale of State land, if the application to enter is not in writing, as required by the statute, the sale is illegal and may be canceled. *State* v. *Jonssen*, 2 Wis., 423.

The rule is well established, that an application to enter State land must conform to the statute, or it will not be regarded as valid. *Wood* v. *Sawtellee*, 46 Cal., 389. The legislature thought proper to require certain facts to be stated in the applicant's affidavit, and it is not for the courts to determine that the facts were not material to be stated in the affidavit, but might be stated in some other manner. *Hildebrand* v. *Stewart*, 41 Cal., 387.

If a pre-emption right is rejected by the register and receiver, the remedy is by appeal to the commissioner, and not to the courts, until the modes of relief provided by law are exhausted. *Sacramento Savings Bank* v. *Haynes*, 50 Cal., 195.

While the claims of settlers are pending before the land department, their rights cannot be litigated in the courts. *Moraney* v. *Ford*, 2 La. Ann., 299; *Courtney* v. *Perkins*, 5 La. Ann., 216.

After claim and offer to purchase, which is followed with appeal, or other proper proceedings, no other entry of the land can be made until a final decision is given on the first application. *Dolhequy* v. *Tabor*, 22 Cal., 274; *Millander* v. *Lalande*, 9 La. Ann., 438.

Where a pre-emption entry has been obtained by fraud, the commissioner may, upon the discovery of such fraud, order a rehearing by the register and receiver, although the proof, when made, was satisfactory, and the money had been paid, and a certificate of entry given. If, upon such rehearing, after notice being given to the pre-emptor, the claim is found to be fraudulent, the commissioner may cancel the entry. *Hill* v. *Miller*, 36 Mo., 182.

A rehearing without notice to the pre-emptor, is void, so far as it affects his rights. *Dunforth* v. *Morrical*, 84 Ill., 456.

Decisions made by the land officers upon questions of fact in the disposition of the public land, where all parties in interest have had notice, and a fair and impartial hearing has been had, will not be reviewed by the courts *Hosmer* v. *Wallace*, 47 Cal., 461; *Gray* v. *McCance*, 14 Ill., 343; *McGehee* v. *Wright*, 16 Ill., 555; *Rutledge* v. *Murphy*, 51 Cal., 388; *Mitchell* v. *Cobb*, 13 Ala., 137; *Henry* v. *Welsh*, 4 La., 547; *Primot* v. *Phibodeaux*, 6 La., 10; *Kerby* v. *Fogleman*, 16 La., 277; *Lewis* v. *Lewis*, 9 Mo., 183.

Where the question of citizenship of a pre-emptor was contested before the land officers, the courts will not review their finding, although the jury find distinctly that the pre-emptor was not a citizen. *Burrell* v. *Haw*, 48 Cal., 222.

As to whether certain land had been granted to the State, was held to be a question of fact, and not subject to be reviewed by the courts. *Hestres* v. *Brennan*, 50 Cal., 211.

The courts will re-examine the facts in the case, where fraud has been practiced on the land officers, either in procuring an entry *Lamont* v. *Stimson*, 3 Wis., 545); or in procuring the cancelation of an entry (*Wiggins* v. *Guier*, 13 La., Ann., 356; *Knox* v. *Pulliam*, 14 La. Ann., 123. But the party complaining will be required to make out a clear case of fraud. *Bracken* v. *Parkenson*, 1 Pinn (Wis.), 685; *Lamont* v. *Stimson*, 3 Wis., 545.

The courts will review the action of the land officers, in refusing to allow an entry, on the ground that the land had been previously entered, *Nicks* v. *Rector*, 4 Ark., 251; or that the land did not belong to the United States, *Copley* v. *Dinkgrave*, 25 La. Ann., 577; or was not subject to pre-emption entry, *Guidry* v. *Woods*, 19 La., 334.

When the applicant has taken the steps required of him by law, to acquire the title to public land, his duties are at an end, and his right to the land cannot be defeated by a subsequent neglect of an officer of the land department to make a return of the survey (*Taylor* v. *Brown*, 5 Cranch, 234;) or a neglect to note the entry on the books of the land office, *Kittridge* v *Breaud*, 4 Rob., (La.), 79; *Hester* v. *Kenbrough*, 12 Smedes and M. (Miss.) 659; *Nelson* v. *Sims*, 23 Miss., 383; or by reason of an error of the officer in making out his entry papers for different land than that applied for, *Climer* v. *Selby*, 10 La. Ann., 182; or by the land officers making the entry papers in the name of another, *Stephenson* v. *Smith*, 7 Mo., 610; also see *Knox* v. *Pulliam*, 14 La. Ann., 123.

Where a certificate has not been located within the time required by law, by reason of the neglect of the land officers, it may be located after the time has expired. *Gibson* v. *Chouteau*, 39 Mo., 536.

A pre-emptor should not be allowed to enter land, not included in his pre-emption filing, to the injury of another settler. *Hess* v. *Bollinger*, 48 Cal., 349.

An entry may be valid as to part of the land, and void as to the other part. *Danforth* v. *Wear*, 9 Wheaton, 673; *Forbes* v. *Hull*, 34 Ill., 159.

JOSIAH GARLAND, Plaintiff in Error, *v.* ROBERT H. WYNN, Executor, &c.

December Term, 1857.—20 Howard, 6; 2 Miller, 243.

Conclusiveness of Patents to Lands—Fraud in Obtaining Patent—Equitable Jurisdiction as between Conflicting Claimants.

It is the settled doctrine of this court that, where a person obtains a patent for lands by fraudulent imposition on the officers of the land department, equity will give relief to the party legally entitled to receive the patent. *Lytle* v. *Arkansas*, 9 Howard, 328; *Bernard* v. *Ashley*, 18 Howard, 44; *Johnson* v. *Towsley*, 13 Wall., 72.

WRIT OF ERROR to the Supreme Court of the State of Arkansas.

The case is sufficiently stated in the opinion.

Mr. Watkins and *Mr. Bradley* for plaintiff in error.

Mr. Pike for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

In November, 1842, William Wynn (the complainant below) proved that he had a preference of entry to the quarter-section of land in dispute, according to the act of 1838, and his entry was allowed.

In February, 1843, Samuel Hemphill made proof that he had a right of pre-emption to the same land, under the act of May 26th, 1830. The two claims coming in conflict, it was decided by the register and receiver at the local land office, that Hemphill had the earlier and better right to enter the land; and in this decision the Commissioner of the General Land Office concurred.

Wynn's entry being the oldest, it was set aside, his purchase-money refunded, and a patent certificate was awarded to Samuel Hemphill, who assigned it to Garland, the plaintiff in error, to whom the patent issued. The benefit of the patent was decreed to Wynn by the Supreme Court of Arkansas; to reverse which decree, Garland prosecutes his writ of error out of this court.

It appears, from the allegations and evidence, that Garland procured the proofs, and was in fact the principal in obtaining a preference of entry in the name of Hemphill, and in causing Wynn's elder entry to be vacated; that the whole proceeding on the part of Garland and Hemphill, was a mere imposition on the officers administering the public lands; that Hemphill never had any improvement on the northeast quarter of section 18, but that his improvement was on the northwest quarter of section 17, which adjoins the quarter-section in controversy; and that Garland induced the witnesses, who made the proof before the register and receiver to establish Hemphill's preference of entry, to confound the quarter-sections and their dividing lines, and misrepresented the extent of the cleared land occupied by Hemphill in 1829 and 1830, so that the witnesses ignorantly swore that the improvement and cultivation were in part on the northeast quarter of section 18, which was wholly untrue; and by which false swearing Wynn's entry was set aside, and Garland obtained a patent of the land.

Garland insists, by an amended answer, in the nature of a

distinct plea, that, by the law of the land, the circuit court had no authority or jurisdiction to set aside or correct the decision of the register and receiver; and that their adjudication and judgment in granting and allowing the pre-emption rights to and in the name of Samuel Hemphill was final and conclusive, and cannot be inquired into, or in any manner questioned, modified, or set aside.

This matter was put in issue: and the court below, when it decreed for the complainant, necessarily decided against the bar to relief set up and claimed under an authority of the United States.

The question is, have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the register and receiver, confirmed by the commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded?

The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come in into the ordinary courts of justice, and litigate the conflicting claims. Such was the case of *Comegys* v. *Vasey*, (1 Peters, 212), and the case before us belongs to the same class of *ex parte* proceedings: nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court.

It was, in effect, so held in the case of *Lytle* v. *The State of Arkansas*, (9 How., 328); next, in the case of *Cunningham* v. *Ashley*, (14 How.); and again in the case of *Bernard* v. *Ashley*, (18 How., 44.)

It is ordered that the decree of the Supreme Court of Arkansas be in all things affirmed.

HUGHES *v.* UNITED STATES.

December Term, 1866.—4 Wallace, 232.

1. The equity of a pre-emption claimant of land under the laws of the United States, who has complied with the conditions imposed by those laws, obtained his certificate by the payment of the purchase-money, and retained uninterrupted possession of the property, cannot be defeated by one whose entry was subsequent, although he has fortified his title with a patent; such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the pre-emption claimant.
2. A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit.
3. A court of equity will set aside a patent of the United States obtained by mistake or inadvertence of the officers of the land office, on a bill filed for that purpose by the government, when the patent *prima facie* passes the title.
4. Open, notorious, and exclusive possession of real property by parties claiming it is sufficient to put other persons upon inquiry as to the interests, legal or equitable, held by such parties; and if such other persons neglect to make the inquiry, they are not entitled to any greater consideration than if they had made it and had ascertained the actual facts of the case.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The United States in 1848 filed an information in the nature of a bill in equity in the court just named against one Hughes for the repeal and surrender of their patent for a tract of land issued to him in 1841, tendering back to him the purchase-money. The case was thus:

By the act of Congress of April 12th, 1814, every person who had inhabited and cultivated a tract of land lying in that portion of the State of Louisiana which had composed the Territory of Orleans, or in the Territory of Missouri, in cases where the land was not rightfully claimed by any other person, and who had not removed from the State or territory, was entitled to the right of pre-emption in the purchase of the land, under conditions and regulations prescribed by a previous act, passed with reference to certain settlers in Illinois. The same right was extended by the act to the legal representatives of the original occupant. Under this act one Goodbee, in 1822, applied to the register and receiver of the land office of the district to become a purchaser of a tract supposed to contain about one hundred and sixty acres,

which had been occupied and cultivated by one Beedle in 1813, under whose settlement he claimed.

His right to pre-empt the tract was recognized by the officers, and, the required price being paid, the usual certificate was issued to him. The land at this time was designated as lot number one, under a special system of surveys authorized by the act of March 3d, 1811. It was some years later before the general system of surveys into ranges, townships, and sections was extended over the country, and when this took place the legal subdivision embraced about fifteen acres in excess over the one hundred and sixty. To this excess, as part of the original lot, Goodbee's right of pre-emption under the regulations of the General Land Office also attached.

At the time he made his entry, Goodbee was in the open and exclusive possession of the premises, and either he or his grantees subsequently continued in such possession, and cultivated the land and erected valuable and permanent improvements thereon.

In 1823 the President, by proclamation, ordered the sale of the public lands of the district. The proclamation was general in its terms, embracing all the lands, without excepting such as had been previously pre-empted or reserved, but the parcels pre-empted or reserved were designated by proper entries in the register of the land office. The tract occupied by Goodbee was thus designated, and was not offered at the public sale which took place.

In 1836 Hughes entered this tract at private sale, designating it by section, township, and range—the proper description under the completed public surveys. The officers of the land office, overlooking from the difference in its description the fact that the tract had been previously sold to Goodbee, gave him the usual certificate of purchase and payment, upon which, in April, 1841, a patent was issued by the United States.

To the bill or information filed below Hughes demurred. The court gave judgment sustaining the demurrer. This judgment having come on appeal here, at December Term, 1850 (11 Howard, 552), was reversed, the demurrer overruled, and the patent to Hughes decreed null and void, and ordered to be surrendered. This decree was afterwards by consent set aside, and the cause remanded to the circuit court, with leave to the defendant to answer, and for further proceedings according to equity. He accordingly did answer; the grounds of defence now set forth

being that he had obtained, in the State courts of Louisiana, two several judgments in two distinct suits.

The first was ejectment brought by him against one Sewall, tenant in possession and claimant of the title under Goodbee, which suit had gone in his favor.

The second one was brought against him by this same Sewall and one Hudson (both claimants under Goodbee), who sought to set aside the patent to Hughes on the same allegations of fraud, as it was alleged, and the same exhibition of documents, that at their instance were now set forth by the United States in the bill or information filed in the Circuit Court of the United States.

This second suit was dismissed for want of jurisdiction and absence of proper parties—so far as the petition related to the relief sought by the bill in the present suit—and it was dismissed generally, because it was defective, uncertain, and insufficient in the statement of the cause of action.

In the suit of *Hughes* v. *Sewall*, judgment was given in favor of Hughes, on the ground that the court could not, in that action, look behind the patent to inquire into the equities of the parties. The Supreme Court of Louisiana affirmed this judgment or appeal, but granted a stay of execution until the validity of the patent could be judicially ascertained.

The Circuit Court of the United States below was of opinion that no sufficient defense was shown by the judgments set up, as above stated, and that the United States were entitled to the relief prayed for, and it decreed acordingly.

The case came here by appeal, and was submitted by Mr Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the United States, and by Mr. Cary, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit is brought to vacate the patent to Hughes, and compel its surrender for cancellation. It proceeds upon the ground that the patent was issued in violation of the rights of Goodbee, or parties deriving title under him, and that its existence impairs the ability of the government to fulfil its engagements to him.

By the act of April, 1814, the United States had extended to Goodbee the privilege of purchasing the land, and had prescribed the mode of proceeding to make the purchase, and fixed the price to be paid. When this mode was pursued, and the price was paid, a contract was completed between him and the government,

which the latter was bound to execute by a transfer of the title.

The patent to Hughes, subsequently issued, stood in the way of an efficient and just execution of this contract.

Its operation was either to divest the United States of the legal title, or, by clouding the title, to impair the security which would otherwise flow from their conveyance. When this case was here on demurrer, (11 Howard, 568. See, also, *Jackson* v. *Lawton*, 10 *Johnson*, 23), the patent was considered by the court to be a valid instrument conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their engagement to Goodbee or his alienees. Whether regarded in that aspect, or as a void instrument, issued without authority, it *prima facie* passed the title, and, therefore, it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress.

The power of a court of equity, by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisdiction.

The patentee cannot complain of the proceedings, for the open, notorious, and exclusive possession of the premises, by the parties claiming under Goodbee, when the patentee made his entry and received the patent, was sufficient to put him upon inquiry as to the interest, legal or equitable, held by them: and if he neglected to make the inquiry, he is not entitled to any greater consideration than if he had made it and ascertained the actual facts of the case.

The judgments recovered by Hughes in the State court of Louisiana—one in an action brought by him against Sewall, and one in action brought against him by Sewall and Hudson—constitued no bar to this suit. The first case was ejectment against Sewall, who was at the time in the occupation of the land, and judgment passed in Hughes' favor, on the ground that the court could not, in that form of action, go behind the patent and inquire into the equities of the parties. On appeal, the judgment was affirmed by the Supreme Court of the State, but was accompanied with a stay of execution until the validity of the patent should be judicially ascertained.

The second case was a petitory action, brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent, the annulment of the above judgment against Sewall, then pending on appeal in the Supreme Court of the State, the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was "defective, uncertain, and insufficient in the statement of the cause of action."

It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit *Walden* v. *Bodley*, 14 Peters, 156; 1 Greenleaf's Ev., §§ 529 and 530, and authorities there cited.

Judgment affirmed.

(See, as to the second point of the syllabus, *United States* v. *Stone*, 2 Wallace, 525.—REP.) (And, as to the third point of the syllabus, see *Leavenworth, etc., R. R. Co.* v. *United States*, 2 Otto, 733.)

CHARLES TATE and others, Plaintiffs in Error, *v.* JOHN G. CARNEY and others.

December Term, 1860.—24 Howard, 357; 4 Miller, 170.

Power of Register and Receiver of Land Office.

1. The decisions of the register and receiver of the land office, under the act of May 8, 1822, concerning lands west of the Perdido river, are not conclusive of the facts on which they act.
2. Such receivers have no right to reconsider and annul certificates granted by their predecessors many years before, under which the land has been held in possession and *bona fide* titles acquired.

3. A certificate and patent, on such second decision, which reserves the rights of the claimant under the first certificate, leaves open the question of right in the matter under the two claims.

WRIT of error to the Supreme Court of Louisiana. The case is stated in the opinion.

Mr. Benjamin for plaintiffs.

Mr. Taylor for defendants.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

This cause comes before this court by a writ of error to the Supreme Court of the State of Louisiana, under the 25th section of the judiciary act of September, 1789. The defendant in error (Carney) commenced a suit in the district court of the 8th judicial district of Louisiana, in which he asserted that he had purchased, in the year 1844, at the probate sale of the succession of Sarah Cohern, deceased, five hundred and sixty acres of land on Cool creek, in that district, and that Charles Tate had disturbed his possession and denied his title. He summoned Charles Tate to exhibit his claim to the land, and required the representatives of Sarah Cohern, deceased, to maintain the title they had warranted to him, or to refund the purchase money he had paid. The result of various proceedings in the district court was the forming of an issue between the defendant in error and the plaintiffs in error, relative to their respective rights in the said parcel of land. It is situated in the section of country east of the Mississippi river and the island of New Orleans, and west of the Perdido river, which was claimed by the United States under the treaty of Paris of 1803, for the cession of Louisiana, and which was adversely claimed and possessed by Spain as a portion of West Florida until 1812–13. The act of Congress for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the Mississippi river and island of New Orleans, approved 25th April, 1812, is the first of the series of acts that apply to this district. (2 Stats. at Large, 713.) The 8th section requires the commissioners to be appointed under the act to collect and report to Congress, at their next session, a list of all the actual settlers on land in said districts, respectively, who have no claims to land derived either from the French, British, or Spanish governments, and the time at which such settlements were made. The reports made by the commissioners appointed under the act of 1812 were submitted to Congress, and are the subject of the act

of the 3d March, 1819, for adjusting the claims to land and establishing land offices in the district east of the island of New Orleans. (3 Stats. at Large, 528.)

The third section of this act provides, "that every person whose claim is comprised in the lists or register of claims reported by the said commissioners, and the persons embraced in the list of actual settlers not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth of April, 1813, be entitled to a grant for the land so claimed or settled on as a donation, provided that not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres." By the 9th section of this act, the register and receiver of the land offices in that district were authorized to make additions to the list of settlers, noting the time of their settlement, and to report the same to Congress. These, with other reports, were disposed of in the supplementary act for adjusting land claims in that district, adopted 8th May, 1822. (3 Stats. at Large, 707.) The third section of the act of 1822 is in the same language as the corresponding section in the act of 1819, before cited.

The sixth section of this act requires the register and receiver to grant a certificate to every person who shall appear to be entitled to a tract of land under the third section of the act, setting forth the nature of the claim and the quantity allowed. In 1820, Robert Yair made proof in the land office that in the year 1805 he had settled upon a parcel of land in the district, and had occupied and cultivated it from that time until the date of his application and proof. His claim was reported to Congress, and in 1824 a certificate issued to him for that land, which is the land in controversy. Robert Yair continued to occupy the land until his death, in 1825 or 1826, when it passed to his widow and heirs. The defendant in error (Carney) traces his title to these heirs. The claim of the plaintiffs in error is traced to Nancy Tate, their ancestress, who made a settlement in the same district in 1811, and whose claim was reported under the act of 1812, before cited.

In the year 1847, her heirs applied to the register and receiver of the land office in that district for an order of survey, in which

application they represented that Nancy Tate was entitled to a section of land under the acts of Congress aforesaid; that she had settled upon public land in an adjoining section, forty-one; that John Tate was settled upon the same section, and that both could not have their complement of land, from their proximity, out of land contiguous to their settlement. But that there was vacant land to the east and northeast, not claimed by any person, sufficient to make up the quantity she had been entitled to, and prayed for the order, as one that could not injure any other person. The register and receiver caused a notice to be served on the defendant in error, to show cause why the order should not be granted. There is no evidence that he appeared on this notice.

In February, 1848, the register and receiver made a decision, in which they declared that Nancy Tate had settled upon this land; that they were satisfied that Robert Yair, at the time of the confirmation to him, was the holder of another donation for one thousand arpents, and that he was not entitled to this under the act of 1822, for that reason. They annulled the certificate that had been issued to him, and granted the order of survey as applied for. The survey was made to include this land, and a patent was issued in favor of the representatives of Nancy Tate in 1853. This patent describes the land as covered by the claim of Robert Yair, and releases the land, subject to any valid right, if such exists, in virtue of the confirmed claim of Robert Yair, or of any other person claiming from the United States, the French, British, or Spanish governments. The Supreme Court of Louisiana have found from the testimony that Nancy Tate was not an occupant of this land, and that the settlement of Robert Yair and his representatives had been continuous for some forty years. The question for the consideration of this court is, whether the decision of the register and receiver of the land office in favor of the plaintiffs in error is conclusive of the controversy. The Supreme Court decided that it was not, and we concur in that opinion.

In *Doe* v. *Eslava*, 9 How., 421, the defendant in error relied upon a decision of the register and receiver of a land office in the same district, with the same powers as were confirmed upon these, as conclusive in his favor. This court answered: "We do not consider that the act of May 8th, 1822, and that of the same date, which is connected with it, and referred to as in *pari materia*, for a guide, meant to confer the adjudication of titles of land on registers and receivers. Sometimes, as in the case of pre-emp-

tions, they are authorized to decide on the fact of cultivation or not, and here, from the words used, no less than their character, they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title, involving, also, the whole interests of the parties, and yet allowing no appeal or revision elsewhere. The power given to them is, to decide only how the lands confirmed shall be located and surveyed.

"The further power to decide on conflicting and interfering claims should apply only to the location and survey of such claims, which are the subject-matter of their cognizance: and on resorting to the reference made to the second act of Congress, that act appears also to relate to decisions on intrusions upon possessions and other kindred matters."

The case of *Cousin* v. *Blanc*, 19 How., 203, involved a question of the effect and binding operation of a decision of the register and receiver of the land office upon a location and survey of a claim confirmed under the act of 1822, and refers to the act of the 3d of March, 1831, as showing that the decisions of the register and receiver were not to be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to interfering claims. (4 Stats. at Large, 492.)

It furnishes no support of the argument that the decision of the register and receiver in such a case as this is conclusive of the title. There is no dispute in this case upon the subject of the location of the claim of Yair. The whole case shows that it had been identified and was actually possessed by Yair and his heirs. The patent of the defendants in error acknowledges that its location had been made, and that the new survey for the claim of Mrs. Tate covered this location. The decision of the register and receiver does not proceed upon any assumption of a conflict of location, but of a denial of the right of Yair. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of the *bona fide* purchasers. It further appears that Mrs. Tate did not settle upon this parcel of land, and that the decision of the register and receiver in her favor is not supported by testimony. The judgment of the Supreme Court of Louisiana does not contain any error within the scope of the revising jurisdiction of this court, and it is consequently. *Affirmed.*

ROOT *v.* SHIELDS.

U. S. Circuit Court District of Nebraska, 1868.—1 Woolworth. 340.

I. CIRCUMSTANCES SHOWING THAT A PARTY HAD NO INTENTION OF PRE-EMPTING A TRACT OF PUBLIC LAND.

A party who goes into possession of a small parcel of a tract of government land, under a claim of right inconsistent with a pre-emption claim; who sells and repurchases the property as town lots; who, in a document wherein he is required to state his residence, states it as being elsewhere; who removes, and remains long absent from the land; and who, from the first, never asserts any pre-emption right to the tract, cannot be deemed to have intended to claim such right.

II. COMBINATIONS TO PREVENT COMPETITION AT LAND SALES AFFORD NO DEFENCE TO A PARTY NOT INJURED BY THEM.[1]

A party who is not himself injured thereby cannot defeat the title of the purchaser at a sale by auction of public land, by showing that a combination to prevent competition in bidding was formed by means of which persons were prevented from bidding, and the land, worth at the time $50 per acre, was obtained for $1.25 per acre.

III. CITY PURCHASING LAND NOT NEEDED FOR ITS CORPORATE PURPOSES.

1. *Rule at common law.*—At the common law, a municipal corporation can take and hold the title to such lands only as its necessities require; nor can it take the title in another's name, in trust for itself.

2. *Modified by statute.*—This rule is changed in Nebraska by statute.

3. *Title of trustee.*—The objection at the common law would avoid the trust, and leave the title in the trustee, discharged of all duty to the corporation, and subject to be disposed of by him, if he held by a deed absolute on its face, and paid the consideration, and the trust were evidenced only by agreement between him and the corporation.

IV. PRIORITY OF ENTRY.—A pre-emption entry, not affected by a radical infirmity, will be upheld as against a subsequent purchaser.

V. LANDS NOT SUBJECT TO PRE-EMPTION.—Lands included within the limits of an corporated town are not subject to entry under the pre-emption law of September 4, 1841. 5 Stat. at Large, 453.

1. *Mischiefs of the act.*—This provision of the statute affords no room for the mischief of including lands within the limits of a city, in order to exclude them from the operation of the law.

2. *Not repealed by organic act.*—The provision is not repealed by the organic act, providing that the legislature of the territory of Nebraska shall not interfere with the primary disposal of the soil. 10 Stat. at Large, 277.)

(1.) *Argu.*—This language has been used for over fifty years in acts admitting new States into the Union, and their power to incorporate towns on the public lands was never questioned.

(2.) *Argu.*—The withdrawal of the lands from the operation of the pre-emption law is the effect of the act of Congress, and not of the municipal charter.

(3.) *Argu.*—The provision of the organic act was aimed at a direct claim of proprietorship on the part of the territory.

3. *The extent of land* which may be included within a city is not limited by the act of May 23, 1844 (5 Stat. at Large, 657), providing for the corporate authorities pre-empting for the citizens 320 acres of the town site.

4. *Policy of provision.*—The provision excepting such lands from operation of the pre-emption act was inserted, as were other exceptions, to secure to the government the enhanced value of lands in and adjoining a town.

VI. ANSWER AS EVIDENCE.—Circumstances tending to establish a fact, held to be insufficient to countervail the positive denial in the answer.

VII. BONA FIDE PURCHASERS.

1. Although they have purchased without any knowledge, in fact, of any defect in their title, yet parties will not be protected as *bona fide* purchasers.[2]

(1.) Who purchased before the patent of the government issued, because until then, the fee is in the United States, and the pre-emptor and his grantees hold only an equity.[2]

(2.) When the defect arises out of a rule of law of which they are bound to take notice.

(3.) When the title acquired is absolutely void.

This was a bill in chancery, filed originally in the District Court of the late Territory of Nebraska. The plaintiff having had a decree there, the defendants carried it by appeal to the Supreme Court of the Territory, where it was pending when the State was admitted into the Union. The plaintiff being a citizen of Nebraska and the defendants citizens of other States, the cause was removed into this court, and heard here upon the transcript of the record of the District Court filed in the Supreme Court.

In 1854, certain parties having associated themselves together as a joint stock company, under the name of the Omaha City Company, surveyed and platted into lots certain portions of the public lands as an addition to the city of Omaha, and among others the west half of the southwest quarter of section 10, and the north half of the northwest quarter of section 15, in township 15 north, range 13 east of the sixth principal meridian. This company issued to different parties certificates, setting forth that the holder thereof respectively would be entitled to twenty lots. The defendant Shields was the holder of one of these certificates,

and when the company divided the lots among the holders of the certificates he received ten, situated in block 128½. Under this title he entered upon these lots in 1855, and built a house thereon, and ran a fence around them on the line between them and the streets. He lived in this house with his family until June, 1856, when he sold the property to one Beesom, describing it in the deed of conveyance as lots in the above-named addition to the town, and by the numbers by which they were designated on this plat, and by which he had drawn them. He then removed to Omaha, where he lived for a while, when he settled on another tract of land in the neighboring county of Sarpy. While residing there he filed in the office of the register of the land office a writtten statement of his declaration of intention to pre-empt said lands under the act of September 4, 1841, and in his declaratory statement he described himself as "of the county of Sarpy." He continued to reside here until September, 1857, when he repurchased from Beesom the lots above mentioned, they being in the reconveyance described as in the former deed. The plaintiff alleges that he did this in pursuance of an agreement with, and with money furnished by, the defendant Test, which the defendants deny. He then removed to the property into the house he had previously built, but made no other improvements; and immediately thereupon he filed in the register's office his written declaration of intention to pre-empt the tract first above described under the act of September 4, 1841, in which statement he alleged a settlement in April, 1856, that being the time when he built the house and first removed to the tract. On the 21st of November following he made proof to the satisfaction of the register and receiver of such matters as are required by law to be shown to them to entitle applicants to pre-empt lands; and he took the oath prescribed in that behalf and entered the land under the act, receiving the usual patent certificate. The bill alleges, and the defendants deny, that this was in pursuance of an agreement between him and Test, and that he should deed a part of the land to him. On the 23d of the same month he conveyed to Test an undivided half of the whole quarter-section thus pre-empted by him, as is alleged in execution of said agreement; and in the following January he conveyed the other undivided half to the defendant Smith. After this the Commissioner of the General Land Office returned the case to the local office, and directed a rigid re-investigation of Shield's pre-emption right in the tract.

This took place in May; and upon voluminous testimony adduced in support of and adversely to the right, the local office found against the entry, and so reported to the commissioner. He affirmed this decision, and the parties holding under Shields, in his name, appealed to the Secretary of the Interior, who was at that time the Hon. Jacob Thompson.

That officer affirmed the previous decisions, and in pursuance of his order in that behalf the entry made by Shields was vacated. This was on the 5th of May 1860; but on the 13th of December, 1861, the Hon. Caleb Smith, having succeeded Mr. Thompson in the Interior Department, without notice to any party, reversed the former decision of his office, decided in favor of Shields' pre-emption right, and directed a patent to issue to him, which was done.

Such was the history of the title as it stood in the defendants. The connection of the plaintiff with the title was this: After Mr. Secretary Thompson had decided adversely to Shields' right, and after the entry which he in 1857 had made was canceled, and before Mr. Secretary Smith had come into office, the land was by the commissioner ordered to be sold at public auction, on thirty days' notice, as a disconnected tract: and on the 10th of July, 1860, it was accordingly sold, a part to one Monell and a part to one Smith. Monell did not purchase on his own behalf, but in trust, partly for those who held deeds to lots from the Omaha City Company, and partly for the city. The plaintiff held deeds to some of the lots, and purchased from the city other portions of the tract, and Monell accordingly conveyed them to him.

Between the time Shields conveyed the lots to Beesom and removed from the tract to Omaha, and the time he repurchased them and returned to his former home, that is to say, on the 14th of February, 1857, the legislature of Nebraska incorporated the city of Omaha. This tract of land, and also some 3,000 acres besides, were included within the corporate limits of the city. In March of that year its authorities, under the act of May 23, 1844, entered at the land office as the town-site 320 acres. From this tract that first mentioned was more than a mile distant. It had never been occupied for any other than agricultural purposes.

The objections taken by the plaintiff to Shields' entry were:

1. That, in point of fact, Shields never settled on the tract with the view of pre-empting it, until September, 1857; that at

that time it was included within the limits of an incorporated city, and, by force of the act, excluded from its operation.

The clause on which this position was rested was as follows:

"SECTION 10. Every person, being the head of a family," &c., who shall "make in person a settlement upon the public lands," &c., "and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be and is hereby authorized to enter with the register of the land office," &c., "a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such lands, subject, however, to the following limitations and exceptions: * * * No sections or fractions of sections included within the limits of any incorporated town."

2. That Shields effected his entry for speculative purposes, and in pursuance of a contract previously made with Test to convey a part of it to him; and, it was claimed that this avoided the entry by force of the 13th section, which required every person, before making the entry, to take an oath before the register that he or she had not "settled on or improved said land to sell the same on speculation, but in good faith to appropriate the same to his or her own exclusive use and benefit; that he or she had not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself or herself."

3. It was also claimed that the record showed that Shields was the owner of 320 acres of land at the time of asserting this pre-emption right, and was within the exception of the act providing that "no person who is the proprietor of 320 acres of land in any State or Territory of the United States, shall acquire any right of pre-emption under this act."

4. It was also claimed that Mr. Secretary Thompson having decided against the validity of the entry, and the land having been offered for sale as government land, at which sale the title was acquired by third parties, it was not within the competency of his successor to summarily reverse this decision, avoid the sale, and issue a patent to Shields.

On these grounds a decree was asked, declaring that the entry by Shields was void, and decreeing that he and his grantees join in a conveyance to the plaintiff.

The defendants insisted that the tract was not within the exception in the act first above mentioned, because:

1. The act of 23d May, 1844, was a repeal thereof by implication. That act provides that the corporate authorities of a city located on the public lands may enter with the register so much of the town site as is actually occupied by the town, in trust, for the several use and benefit of the occupants thereof, according to their several and respective interests.

2. That the construction of the act of 1841 was unreasonable, and involved great inconveniences.

3. That the city was incapable of making this purchase even by a trustee.

4. That the defendants, except Shields, who had parted with all his interest, were *bona fide* purchasers, for a valuable consideration, without notice.

Mr. Woolworth for plaintiff.

Mr. Briggs for defendants.

MR. JUSTICE MILLER:

It is necessary to fix the point of time at which Shields first asserted a pre-emption claim to these lands for, in the view which we take of the case, upon that depends the validity of his entry, and of the title which was acquired in virtue thereof. The plaintiff, in his bill, insists that Shields did not conceive the idea of asserting a pre-emption right in the land until September, 1857, and supports that position by a detailed statement of the facts connected with his dealings with and in respect of the tract. On the other hand, the defendants, in their answer, insist that Shields acquired a right to pre-empt the land as early as April, 1856, and that he did nothing subsequently to compromise his claim thereto.

From the first, down to September, 1857, the history of these lands, as conclusively shown by this record, is this: At an early day, almost as soon as Nebraska was open for settlement, and very shortly after the city of Omaha was planted, certain parties, taking to themselves the style of the Omaha City Company, divided the lands here in dispute into lots, and made a plat of them. They did not apportion the lots among themselves, but they issued to third parties certificates, which, upon a distribution afterwards to be made, entitled the holder of each to a certain number of lots. When this distribution among the holders of the

certificates took place. Shields held one numbered 416, and drew certain lots in block 128½, and, by exchange of lots with one Mitchell, who, as the holder of another certificate, drew others in the same block, he became possessed of a right (whatever that was) to ten lots, all lying together. And, by deeds from the company to himself and to Mitchell, and from Mitchell, Shields acquired such a title as could then be made to this parcel of land, consisting of the ten lots.

This was before the government had provided any means by which settlers or others could acquire its title to any lands in Nebraska.

It was under this title, or under the right or claim thus derived, that Shields, in 1856, entered, built a house, and took up his residence upon this parcel of the quarter-section. It is a significant circumstance that he built his fence, enclosing the parcel, on the line of these ten lots, and the streets by which they were bounded.

He continued to live here for some time, until he sold out to one Beesom. In the deed which he then made to Beesom, he describes the property sold as so many lots, giving their numbers, in block 128½, in the city of Omaha.

Thereupon he removed to Omaha, and afterwards to a tract of land in Sarpy county. Some time in the summer of 1857, he filed with the register of the land office his statement of intention to pre-empt the tract of land in Sarpy county on which he lived, and described himself therein as "of Sarpy county." In September of that year, he re-purchases from Beesom the lots in block 128½, and in the conveyance which he received, the premises conveyed are described as lots, as they had been conveyed by him in his deed to Beesom. Thereupon he asserts a right to the whole quarter-section. Passing by all consideration of the relative rights and duties of Shields and the city company, arising out of the manner in which he went into the occupancy of the lands, and also, of the effect of his filing on one tract while maintaining a claim of pre-emption to another, we need here merely direct our attention to the inquiry, what was Shields' intentions in respect of the quarter-section, as shown by his conduct? We see him entering into a very small portion of the tract, under an apparent claim inconsistent with the idea of a pre-emption right.

We see him selling and re-purchasing the lots as town lots, which can hardly be reconciled with the claim to the tract as agricultural land. We see him, in a most important document,

made and filed in a public office, in order to acquire title to another tract, describing himself as residing elsewhere.

We see him removing from the land which he here claims, continuing absent therefrom a much longer period than he ever, from first to last, resided upon it, and during all this time he never asserts any claim to the tract under the pre-emption law.

When these facts are considered in connection with the requirement of continued and *bona fide* residence on the tract claimed by a settler under the beneficent privileges granted by the pre-emption law, the conclusion is irresistible, that he had no idea of asserting, or of having any other rights than such as he had in the lots alone, and under the city company's deeds. He certainly never asserted any right of pre-emption to the whole quarter-section.

Indeed, the force of the facts above enumerated was so strong, that upon the argument the counsel for the defendants was constrained to concede, notwithstanding the allegations in the answer, that it was not until September, 1857, that Shields acquired or asserted a right of pre-emption in the tract.

This matter, then, being disposed of, the other facts, so far as they are necessary to the decision, are undisputed. These are the following:

In February, 1857, the city of Omaha was incorporated. Nearly 3,000 acres were included within the corporate limits. The tract here in question was a part of these lands. In September following, Shields filed with the register of the land office his written declaration that he claimed and intended to pre-empt the west half of the southwest quarter of section 10, and the north half of the northwest quarter of section 15, in township 15 north, range 13 east of the sixth principal meridian; and in November of the same year, he made proof to the satisfaction of the register and receiver of those facts required to be shown by pre-emption claimants, took the prescribed oath, and effected his entry of the tract, and received the usual patent certificate therefor. When the papers in the case were, by the local officers, according to the usual course of such business, transmitted to the Commissioner of the General Land Office, he remitted them to the local office with a direction that the right of Shields should be re-investigated.

This was done, and, as this record shows, very thoroughly done. It resulted in a letter addressed by the local officers to the com-

missioner, holding adversely to the validity of the entry, upon several grounds.

The commissioner affirmed this decision, and the entry was, in the summer of 1858, vacated. From this decision an appeal was taken to the Secretary of the Interior, who, at that time, was the Honorable Jacob Thompson, and he affirmed the two previous decisions. The lands were thus, so far as the authority of the land department extended, restored to the body of the public domain. Thereupon, and on the 10th day of July, 1860, in pursuance of an order of the commissioner, the local officers sold the tract at public auction, as government land. One Smith bid in one half, and one Monell the other half, of the quarter-section. The lands in question in this suit are a part of the half bidden in by Monell. He did not buy for himself, but in trust, partly for persons claiming lots under the deeds of the Omaha City Company, and partly for the city of Omaha. This plaintiff held deeds from this company to some of the lots, and purchased a part of the tract from the city: and Monell accordingly conveyed the lot to him, as a party in trust, for whom the purchase to that extent was made, and the parcel sold to him by the city, by direction of the city.

These deeds were made in January, 1861.

The plaintiff entered into the premises shortly afterwards, and has expended considerable sums in their improvement.

On the 13th day of December, 1861, the Honorable Caleb Smith, having succeeded Mr. Thompson as Secretary of the Interior, without any further hearing of the parties, and upon the record which was before his predecessor, reversed all the decisions which had been made upon the question of the validity of Shields' entry, and, as a consequence, such action vacated the public sale, and ordered that a patent issue to Shields. Accordingly, on the 24th of February, 1863, without any further proceedings, the patent was issued to him. These are the undisputed facts, and in the view which we take of the case, are sufficient for its determination.

Several objections are urged to the plaintiff's title, to which our attention should be first addressed, for, whatever may be the validity of the title alleged by the defendants, if objections may be urged against that of the plaintiff, which are fatal to it, no further inquiry is necessary.

One of these objections is, that at the time of the public sale

at which Monell purchased the land, he, the plaintiff, and others, entered into a combination to prevent competition among bidders. This allegation in the answer is not supported by proof; but even if it were, it is not matter of defence of which these parties can in this proceeding avail themselves.

The charge in the answer is in substance this: That, before the sale, a large number of persons entered into an unlawful combination to protect Monell in bidding in one half, and Smith the other half, of the quarter-section, at $1.25 per acre; that the plans in that behalf of these parties was matured at secret meetings; that the lands were, at the time, worth $50 per acre, and this conspiracy was formed to defraud the United States of a large sum of money; that these parties attended the sale, many of them armed, and by violent threats intimidated many persons who were desirous of bidding on the lands, so that they did not do so; and thus Monell and Smith were enabled to, and did, bid the lands in at the minimum price.

Now, it is apparent that all that this charge, as made in the answer, tends to, is to show that the United States were defrauded by this proceeding. These defendants did not suffer therefrom. But the United States do not complain. On the other hand, with every means of inquiring into such a matter in their own tribunals, by their own officers, they accepted the sale as a fair one. It was never set aside except as a necessary consequence of reinstating a prior entry. These defendants cannot avail themselves of an injury which they charge another has suffered, when the injured party not only does not complain, but even affirms the act by which it was inflicted. Especially can they not do so when they aver such matter, not in support of their own right, but in order to break down the right of their adversaries. (*Fackley* v. *Ford*, 24 Howard, 322.)

Another objection urged against the plaintiff's title is, that as the city, as a municipal corporation, was incapable of making this purchase directly, it could not do so indirectly by the aid of a trustee, and therefore the sale to Monell was void. It is true that, at the common law, a municipal corporation can only take and hold the title to such lands as its corporate necessities require. Nor do I think it can do indirectly what it cannot do directly. It cannot take the title in the name of another in trust for itself, and thus secure to itself the avails of the void purchase. But in Nebraska that rules doe not obtain. It has been changed by

statute. It is provided that towns and cities "may grant, purchase, hold, and receive property, both real and personal, within such town, and lease, sell, and dispose of the same for the benefit of the town." In that view the objection is not tenable.

But to what does the objection go? To the trust. Were it valid, it would avoid the trust. The sale itself and the title acquired under the sale, and the conveyance in pursuance of the sale, would all still remain. The estate would be vested in the trustee just as absolutely as if he had purchased for himself. He might have repudiated his obligations to the city as his *cestui que trust*, and yet retain the title to be conveyed and disposed of effectually by him. It is not necessary to inquire what his rights would have been, had he acquired them by a conveyance expressing a void trust on its face. Here we have a conveyance to Monell, absolute on its face, the consideration for which, so far as this record shows, passes from him, and not from the city. The trust is evidenced by an agreement in that behalf between it and him. He took the title; and he has conveyed to this plaintiff. It is not material to inquire whether the trust was valid or not. Irrespective of that question, he took, and he conveyed to this plaintiff, a good title.

It now becomes necessary to inquire whether the title alleged by the defendants under Shields' entry was valid.

Being prior in time to Monell's purchase, it is to be upheld, unless that entry is affected by some radical informality. The facts are very few and simple. They are these:

1. The city was incorporated, and these lands included within the corporate limits, in February, 1857.

2. Shields had no pre-emption claim to them prior to September, 1857.

3. The act granting to him such right, if any he had, provides that a party of the character therein described may pre-empt any portion of the public lands, except such as are included within the limits of an incorporated city.

It does not need a single word to show that the law on its face does not authorize a pre-emption entry of the lands here in question. But it is insisted, on behalf of the defendants, that this exception in the law is inoperative here. One reason alleged is, that the mischiefs of such a provision are so serious that Congress could not have intended the effects which would follow. It is said that the State or territorial legislature, in which rests the

authority of incorporating cities, might, by unduly extending their limits, exclude large bodies of land fit only for agricultural purposes from the beneficent operations of the pre-emption act, and defeat the object of Congress.

We do not stop to repeat what has been said a great many times of the duty of the court when applying to a case a provision of a statute, the terms of which are clear and precise, and when urged to nullify it by considerations of mischief growing out of it. Here we think the mischiefs are imaginary rather than real. If the local legislature were so unwise as to endeavor to defeat the purposes of a law enacted for the benefit of its constituents, Congress could readily, and certainly would immediately, remedy the evil. And it is not conceivable that the local legislature would ever attempt any such thing.

The pre-emption law was enacted for the benefit of the settlers in the new States and territories. It offers to that adventurous and worthy class of citizens the advantages of selecting, and securing in advance of the speculator, the more desirable tracts in the new region. And the uniform policy of the land department is to retain the public lands in such a situation for a long time, in order to give those who are willing to encounter the hardships and dangers of frontier life, an opportunity to make selections and to settle upon them and make payment for them at the minimum price, before any portions of such lands are offered to purchasers in general. Accordingly, such settlers constitute almost the whole body of citizens who settle in such regions. It is not conceivable that they would deliberately devise a measure which would defeat an enactment by which valuable privileges are secured to themselves, and by which the region of country in which they live would be populated and improved. Precisely this agreement was urged in the case of *Gilman* v. *Philadelphia*, 3 Wallace, 713, 731. It was held untenable there, for the reasons indicated above.

It is insisted that the clause in the law containing this exception is repealed by the provision in the act organizing the territory, that its legislature should not have authority to interfere with the primary disposal of the soil. It is said, that if the territorial legislature can, by incorporating a city, withdraw the lands included within its limits from the privileges of pre-emption, it may, and it does, thereby interfere with the primary disposal of the soil. This argument is specious rather than sound.

If the provision of the organic act has the effect claimed, it is

because it repeals the provision of the pre-emption law by implication. Between these two provisions there is no such repugnance that they cannot both stand. So that we cannot imply a repeal of the former by the latter. *United States* v. *Ten Thousand Cigars*, *ante*.

This provision in the act is the same as is found in most of the acts admitting new States into the Union. It is intended to withdraw from the local legislatures some special matter of general concernment, and indicates a settled policy in respect thereof.

In 1802, in the act admitting Louisiana, the words used were, "They," that is the people of the new State, "forever disclaim all right or title to the waste or unappropriated lands lying within the said territory; and the same shall be and remain at the sole and entire disposition of the United States." (2 Stats. at Large, 642.) And the very phrase here employed by Congress appears in the act for the admission of Michigan, passed on the 15th of June, 1836 (5 Stats. at Large, 59), and will be found in all similar acts since passed. Having its origin in some reason of general application, it has been felt as a necessary, and adopted as an approved, provision in the legislation of Congress.

One or two considerations will disclose this.

To incorporate a city located on the public lands, however contracted its limits, is to withdraw from the operation of the pre-emption law lands included within them. If including public lands within the limits of an incorporate city is an interference with the primary disposal of the soil, then the new States cannot pass an act incorporating a city located on the public lands. But this power in the States was never denied. It has always been exercised by them exclusively of the federal government. Indeed, the legislation of Congress concedes the power.

So it cannot be that incorporating a city on the public lands interferes with the primary disposal of the soil, even though it has the effect to withdraw the lands within its limits from the operation of the pre-emption law.

I have thus far spoken of the power of States, and am reminded that the charter of Omaha was enacted by a territory. But we have already seen that the provision has its place in acts admitting States, as well as in acts organizing territories; and that it is universally used, on account of a general policy. So the argument in the one case is of equal force in the other.

An act incorporating a city which is located on the public lands,

does not, by its own force, withdraw lands from pre-emption. That effect is produced by the congressional provision, and is remote, indirect, and only consequential.

These obvious considerations show very clearly that when Congress provided that the territory should not interfere with the primary disposal of the soil, it did not intend to deny the authority to incorporate a city on the public lands.

But this exception in the pre-emption law was not inserted with any view whatever to the extent of the corporate limits of a city, whether they should be reasonable or unreasonable. It was assumed that there was a class of lands which the local authorities would regard as more desirable for town occupation than for agricultural use.

Without any inquiry as to the correctness of the opinion on that subject of those who were on the ground, and without convenient means of answering such an inquiry, Congress deemed the short way the best way, to exclude them all from the operation of the act by a general rule.

And when, with such a provision of statute before it, and with such obvious reasons for enacting it, Congress proceeded to organize the territory with the clause which is before us, it is reasonable to suppose that it intended to repeal or modify the former rule.

The clause in the organic act was intended to forbid the territorial legislature passing any law to dispose of the public lands as if on its own authority, or intermeddling with the mode by which the general government should dispose of them, or assuming any authority or jurisdiction in respect of that business. It was not intended to deny authority to pass a law which the territory alone could intelligently enact.

Clearly the position of the defendants on this ground is untenable.

But we are met by still another reason against giving effect to the exception in the pre-emption law. It is, that the act of May 23, 1844 (5 Statutes at Large, 657), restrict the corporate limits of a city to 320 acres.

All that that act provides, so far as the matter here in hand is concerned, is that any portion of the public land actually occupied as a town site, may, to the extent of 320 acres, be, by the corporate authorities, entered at the proper land office, and at the minimum price, in trust for the occupants. Prior to the passage of that act there was no mode provided for the occupants of such towns acquiring their titles except at the public sale.

The public sales of lands are often delayed long after a large section of territory has been opened for settlement.

This is in order to enable settlers to enjoy the preference in acquiring the more valuable tracts. And these sales are made in parcels of not less than forty acres each, and therefore do not afford an appropriate means to claimants of small lots for acquiring title thereto. Congress accordingly provided this mode of relief to such parties, expressly restricting the advantages which it granted to lands actually occupied, and to 320 acres. The *status* of the remaining lands within the corporate limits was untouched. They could not be entered under this act, nor could they any more after than before the passage of it, be pre-empted by an individual. The title to them could only be acquired at public sale.

No one of the reasons urged on behalf of the defendants against giving effect here to the clear and express provision of the law, that the lands within the limits of an incorporated city should not be subject to pre-emption, are tenable.

But if we look to the policy of the provision, we are led to the same conclusion.

Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. So too when a railroad is built through a section of country, the same result follows. So too in respect of lands which have been reserved for the use of an Indian tribe, when the Indian title is extinguished, the same may be said. While such lands are held as a reserve, population flows up to their boundaries and is there staid; it of course constantly grows more and more dense, so that when the reserve is vacated, the lands have increased in value, and are always eagerly sought after. The other classes of lands mentioned in the exception, as for instance those on which are situated any known saline or mines, have some intrinsic value above others.

Now all these classes of lands are excepted from the operation of the act, and for the one common and obvious reason, that being of special value, the government desires to retain the advantage of their appreciation, and is unwilling that any individual, because of a priority of settlement, which certainly can be of but brief duration, should, to the exclusion of others equally meritorious, reap benefits which he did not sow.

This is as true of lands within the limits of an incorporated

city, as of any other of the classes mentioned in the exception. And it is no answer to this view to suggest that lands thus excluded from pre-emption are not occupied for a town. They are included within its limits by the local legislature, because likely to be required for such occupancy. And it is this fact, and their proximity to the town, which gives them special value.

This very circumstance of their situation brings them into the classes of lands mentioned.

The lands were not, at the time Shields first asserted a pre-emption claim thereto, subject to entry under the act, and the entry which he made was illegal and void.

It is also insisted against the validity of this entry, that Shields personally was within one of the exceptions which relate to the character of the pre-emption claimant, and was therefore incapable of making any entry under the act.

It is alleged that he was the owner of 320 acres of land. This is denied very positively in the answer. The proof consists of many circumstances tending, it is claimed, to establish the fact. Perhaps so. But against the denial it is not conclusive.

Again, the entry is assailed on the alleged ground that he entered into a contract with Test, by which the title which he should acquire should inure to Test's benefit. It is insisted that Shields repurchased the property from Beesom with money furnished to him by Test for the purpose, and that circumstance, taken in connection with the further fact that he conveyed an undivided half of the quarter-section to Test, the second day after he made his entry, support the allegation. But we have here, too, the positive denial in the answer, which we think is not overcome by the plaintiff's proofs. It is unnecessary to decide these questions. Let it be understood that we place our decree upon the ground that the land was not subject to pre-emption, and that for that reason the entry made by Shields was void.

It is further insisted on behalf of the defendants, that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons. They all purchased before the issue

of the patent. The more meritorious purchased after the entry had been assailed, and decided against by the land office.

But that is a circumstance not material to this consideration. Until the issue of the patent, the legal title remaind in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase, and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary.

Besides, these defendants were bound to know the law. They were bound to know that these lands were within the limits of the city; and that lands within the limits of a city cannot be pre-empted. Knowing these facts, they knew that Shields' entry was void. They did not purchase without notice.

Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before.

And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all.

In order to the maintenance of this defence, there must subsist an interest which the law approves and will support, and we have shown in this opinion that that never existed.

There must be a decree according to the prayer of the bill.

Decree accordingly.

As to form of decree to be entered in such a case, see *Silver* v. *Ladd*, 7 Wallace, 219.

1. Also, see *Easley* v. *Kellom*, 14 Wall., 279.

A third party cannot raise, in ejectment, the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant. *Field* v. *Seabury*, 19 Howard, 323; *Burgess* v. *Gray*, 16 Howard, 48.

One in possession without title cannot show that the plaintiff's title was obtained by fraud or mistake, as a title so obtained is not void, but voidable. *Hunter* v. *Hemphill*, 6 Mo., 106; *Mitchell* v. *Parker*, 25 Mo., 31; *Lee* v. *Parker*, 25 Mo., 35.

2. An illegal entry is no entry, and the doctrine of notice in such cases has no application. Notice of an illegal entry does not make it legal. *Kerr* v. *Mack*, 1 Ohio, 161; *McArthur* v. *Phoebus*, 2 Ohio, 416.

The purchaser of land before the patent has issued, takes the title subject to the power of the commissioner to cancel the entry for the same causes, as though the title to the land remained in the purchaser from the government. *Randall* v. *Edert*, 7 Minn., 450; *Gray* v. *Stockton*, 8 Minn., 529.

Subsequent purchasers are considered as acquiring the interest of the person making the entry, so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule as to innocent purchasers does not apply. *Kerr* v. *Watts*, 6 Wheaton, 550.

JAMES KELLEY *v.* DANIEL WALLACE ET AL.

Supreme Court of Minnesota, January Term, 1869.—14 Minnesota, 236.

(This case was argued and determined at the July Term, 1868.—REP.)

An allegation in an answer that certain acts, in themselves right, were against the provisions of an act of Congress and in fraud of the plaintiff, is an allegation of a legal conclusion, and not an allegation that the acts were fraudulently done.

In an action to cancel and set aside a certificate of entry of public lands and the patent issued thereon, if the complaint does not allege fraud, no evidence of fraud can be received on the trial.

The sufficiency of certain evidence to sustain the material findings of a referee considered and determined.

To constitue a valid right of pre-emption under the act of Congress of 1841, the law requires a personal settlement upon the land by the claimant, followed by occupancy of the land as the home of the settler, the erection of a dwelling-house thereon, and the cultivation or improvement of the land. What shall constitute such occupancy or improvement must depend upon the circumstances of each case. The general rule is, that the settlement must be such as to show under all the circumstances a *bona fide* intention on the part of the settler to occupy and improve the premises as his home.[1]

The sufficiency of certain evidence to sustain the conclusion that in this case there was a *bona fide* settlement and occupancy of the land under the act of Congress of 1841, and that there was no abandonment of the claim by the pre-emptor, considered and determined.

A certified copy of a letter on file in the office of the Commissioner of the General Land Office, if admissible to prove the contents of the original letter, must be authenticated in the manner prescribed by the statutes of our State. Gen. Stat., ch. 73, sec. 58, p. 527.[2]

Kelley and Wallace were contestants for the right to pre-empt a certain forty-acre tract of land. The local land officers decided in favor of Wallace, and their decision was affirmed at Washington, both by the Commissioner of the General Land Office and the Secretary of the Interior. Kelley brings this action in the District Court for Blue Earth County, to have the duplicate and patent which were issued to Wallace canceled, and for an order or direction of the court requiring the local land officers to receive payment for said land from him, and to issue to him the proper receipt or duplicate therefor. He joins the said land officers as parties defendants with Wallace. The cause was tried before a referee, who found in favor of the defendants. The plaintiff made a motion to set aside the report of the referee, and for a new trial, which was denied, and he appeals from the order denying the same to this court. A sufficient statement of the pleadings, evidence, exceptions taken, and findings of the referee, for a full understanding of the questions raised and decided, appears in the opinion of the court.

Francis Beveridge for appellant.

Buck & *Freeman* for respondent.

By the Court, MCMILLAN, J.:

It appears that the defendant, Wallace, commenced a settlement upon the southwest quarter of section 25, T. 107, R. 25, on the 6th day of June, 1863, pursuant to the pre-emption law approved September 4th, 1841, and on the same day filed his declaratory statement in the proper land office; that on the 5th of July, 1863, the plaintiff commenced a settlement on certain lands, embracing a portion of the land claimed by the defendant, namely, the southeast quarter of the southwest quarter of section 25 aforesaid, the land now in controversy. The parties contested their rights respectively to enter this land before the local land office, which resulted in a decision by the land officers in favor of the defendant Wallace, and on an appeal to the Commissioner of the General Land Office the decision was affirmed, which decision was also affirmed on appeal to the Secretary of the Interior.

This action is brought to cancel and set aside the entry of Wallace and the patent issued thereon.

The cause was tried by a referee, and resulted in a finding for the defendant, whereupon the plaintiff moved the court to set aside the report of the referee, and for a new trial, which was

denied. From the order denying this motion the plaintiff appealed to this court.

The appellant makes several points on the appeal, which we proceed to consider.

The first and fourth points will properly be disposed of together:

"1. The referee erred in finding that the complaint does not allege any fraud upon the part of the respondent in procuring and the land officers in issuing the patent as against the plaintiff. The complaint does allege fraud."

"4. The referee erred in excluding evidence that tended to show fraud on the part of the defendant."

From an inspection of the complaint we think it clearly appears that there is no fraudulent intent charged against Wallace or the land officers in any part of their proceedings.

The allegation in the complaint, "that the decision of the register and receiver and the confirmation thereof by the Commissioner of the General Land Office and the Secretary of the Interior, and the issuing of the duplicate or receipt for the purchase-money of said land to the said defendant Wallace by said defendants Swift and Downer, was against the provisions of said act of Congress and in fraud of the plaintiff," is not an allegation that the defendants, or either of them, acted fraudulently in any part of the proceedings referred to; and the allegation that the decision was against the provisions of the act of Congress is not an allegation that it was fraudulent.

It appears in the case that on the trial objection was made "to all parts of testimony that tend to prove fraud on part of defendant, as incompetent and inadmissible evidence under the pleadings," and that the plaintiff as not allowed to amend his pleadings. Whether any such evidence was offered or passed upon does not appear; but if it was, we think the complaint does not allege fraud, and that such evidence would not be admissible.

The second and third points of the appellant, and which will also be disposed of together, are:

"*Second.* The referee erred in finding as follows: 'We think a sufficient reason for his (Wallace's) not following up his claim to the land, as made in June, 1863, is found in the violence that was used and threatened both him and his improvements, as well as the condition of his family during most of the time that intervened from the summer of 1863 to June, 1864.'"

"*Third.* The referee erred in finding that the facts do not show an abandonment by Wallace of the claim in question."

The referee finds as facts upon which these conclusions are based: "That Wallace in good faith made his claim to said southwest quarter of section 25, Town. 107, Range 25, on the 6th of June, 1863, and that in the same month he built a shanty on the same, hauled some lumber on said claim, and dug or cleaned out a spring on the land, and that within a few days after this the lumber that Wallace had brought on the land with a view of building thereon was, without the knowledge (consent) of Wallace, hauled away by said plaintiff." It further appears that between the 27th and the 30th of June, 1863, the shanty that Wallace had put up was also removed by some one, but by whom does not appear. It is also shown that within a few days after making his claim Wallace bought a house with the intention of removing the house on to his claim, but that he did not do so, for the reason that he feared it would be destroyed by violence.

And the language of plaintiff to Wallace seems to afford a reasonable ground for this conclusion, for said plaintiff testifies: "That some time in the month of June, 1863, he told Wallace that he (plaintiff) would not allow any one to build on his claim." And the testimony shows that angry and violent words passed between plaintiff and Wallace as to their claims to said lands, and there is testimony tending to show that plaintiff and others in concert with him threatened to use force to eject Wallace from his claim. It is proven that as soon as Wallace learned that his shanty had been removed from his claim he posted up notices offering a reward for the discovery of the person who had done the act. It is also shown that Wallace, at and about the time of making these improvements, intended to remove his family (then residing in Mankato) to said claim, but on account of the ill health of his wife he was prevented from doing so. It is also shown that there was no physician at the agency in 1863. This illness of his wife continued through the summer and fall of 1863, so that, as Wallace believed, she was not able to be removed such a distance. And the testimony of the family physician shows that in the spring of 1864 the wife of Wallace was suffering with the disease of which she shortly after died. Wallace, deeming it unsafe to remove his wife, did not move with his family to the claim until the 8th of June, 1864, after which time Wallace and family continued to reside on the claim as their home until the

—— day of January, 1865, when his wife died. It is also shown that Wallace's family consisted in part of several small children, one born in July, 1863, and another not then three years old. The evidence shows that Wallace went out to his claim in November, 1863, and again in March, 1864, but it does not appear how long he remained on the claim at either of these times. In May, 1864, Wallace dug a cellar, or part of a cellar, on his claim, and in June or July, 1864, he broke ten or fifteen acres of land thereon; and, as already stated, in June, 1864, moved with his family on the claim, and remained there until the death of his wife."

We think there is evidence sufficient to sustain this finding, so far as the facts material to the action are concerned, and that the conclusions of law by the referee are substantially correct.

From the fact that Wallace immediately upon his settlement cleared out the spring, and, as his testimony shows, hauled lumber on to the land to build within a week thereafter, and actually built a house or shanty on the land during the same month, it would seem to be a reasonable conclusion that he was preparing to occupy the same with his family. If he had not been interrupted and obstructed by the plaintiff Kelley and others, by threats of violence and the removal of his house, notwithstanding the ill health of his wife, his purpose might have been accomplished.

To have removed his wife and family to the land without a place of shelter for them, when his wife was in such feeble health, and there was no physician at the agency, would render it almost certain that fatal consequences would ensue from her removal to this scene of strife and violence. As it was, it appears that Wallace, having during the month of May erected a second dwelling, removed his family into it on the 8th of June, 1864, where, on the 17th of January, 1865, his wife died of the disease from which, according to the testimony of her physician, she had long been suffering.

To constitute a valid right of pre-emption under the act of 1841, the spirit and terms of the law required a personal settlement by the claimant upon the land, and the original settlement must be followed by occupancy of the land as the home of the settler, the erection of a dwelling-house thereon, and the cultivation or improvement of the land; but what shall constitute occupancy or improvement must depend upon the facts of each case, and no absolute rule can be laid down to govern all cases.

In the case of a married man the settlement may be made

originally without the presence of his family, and the time when the family must follow may be different in different cases.

The only rule which can be laid down is, that the settlement and occupancy must, under all the circumstances, be reasonable as to the time and manner, and show a *bona fide* intention on the part of the settler to occupy and improve the premises.

In this case the settlement made by the defendant, Wallace, was prosecuted by immediate efforts to provide a place of shelter for his family. In this he was obstructed by threats and violence until a period when he could not, with reasonable safety to his wife, remove his family to the land; nor could he at any time previous to the spring of 1864 remain there; yet in November, 1863, he asserted his occupancy by going to his claim, and in March, 1864, commenced and finished his second dwelling-house.

We think, under all the circumstances, there is sufficient evidence to justify the conclusion that there was a *bona fide* settlement and occupancy of the land by Wallace, and that his claim was not abandoned. The copy of a letter purporting to have been written by Wallace to Kelley, dated Mankato, May 26, 1864, certified by the Commissioner of the General Land Office to be a true and literal exemplification of the original on file in his office, was properly excluded.

Whether a certified copy of the letter, properly authenticated, would be admissible, we do not decide. In this instance the certificate of the commissioner did not conform to the requirements of the statute of our State, and for that reason the copy was not admissible. Gen. Stat., chap. 73, sec. 58, p. 527. The order of the District Court denying the motion to set aside the report of the referee and for a new trial was not erroneous.

Judgment affirmed.

1. Merely living on public land does not give a pre-emption right. *Weaver* v. *Fairchild*, 50 Cal., 360; *Fitzpatrick* v. *Dubois*, 2 Sawyer, 434.

2. The mode of authenticating the records of the land department is governed by the laws of the United States, and not by the statutes of this State. *Gilman* v. *Riopelle*, 18 Mich., 145.

The person setting up a superior right of pre-emption against a patent must show that he was entitled to the preference, and that he made, or offered to make, proof and payment before the register and receiver. *Fenwick* v. *Gill*, 38 Mo., 510; *Dunn* v. *Schneider*, 20 Wis., 509; *Mahoney* v. *Van Winkle*, 33 Cal., 448; *Quinn* v. *Kenyon*, 38 Cal., 499; *Sacramento Savings Bank* v. *Haynes*, 50 Cal., 195.

SAMUEL STALNAKER, plaintiff in error, *v.* JOHN MORRISON, defendant in error.

Supreme Court of Nebraska —October Term, 1877.—6 Nebraska, 363.

1. PUBLIC LANDS OF THE UNITED STATES.—The even-numbered sections along the line of the Union Pacific Railroad and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry.
2. U. P. R. R.; B. and M. R. R.—The B. and M. R. R. extension is one of the branches of the Union Pacific R. R., and the lands within the limits of the grant to that corporation are not subject to private entry.
3. PRE-EMPTION.—It is only in cases where lands are subject to private entry *at the date of settlement* that a pre-emptor must make proof and payment within a year from the date of settlement.[1]
4. —When lands have been offered at public sale, and thereby become subject to private entry, if they are afterwards included within the boundaries of a grant to a railroad company, and are thereby withdrawn from private entry, and subject to settlement and entry under the pre-emption and homestead laws exclusively, they are to be treated in all respects like unoffered lands.
5. A party pre-empting any portion of such lands has thirty months after the date of filing his declaratory statement, in which to make final proof and pay for the same.
6. The object of the guards thrown around the privilege of pre-emption by the law, is to secure on the public lands actual permanent settlers.
7. EQUITY JURISDICTION.—The jurisdiction of a court of equity to determine the rights of parties in case of conflicting claims to a tract of land is undoubted.
8. EJECTMENT; DEFENCES.—Under the code, an equitable defence may be set up in an action of ejectment.

ERROR from the District Court of Lancaster County, to which the cause was taken by change of venue from Cass county. Tried below before POND, J.

The facts are stated in the opinion.

Cobb, *Marquett*, and *Moore*, for plaintiff in error, cited sec. 15, Stats. at Large, 39, chap. xx, Rev. Stats. U. S., 418; secs. 2,264, 2,267; *Johnson* v. *Towsley*, 13 Wall., 72; *Shepley* v. *Cowan*, 91 U. S., 330.

Lamb, *Billingsley*, and *Lambertson*, for defendant in error, cited Lester's Land Laws, vol. 1, pages 34, 48, 234, 278. Act July 7, 1870. U. S. Stats. at Large, 188.

MAXWELL, J.

On the eighteenth day of January, 1871, the plaintiff in error settled upon a tract of land in Cass county, belonging to the United States, and on the sixteenth day of February following, filed with the register of the proper land office his declaratory statement of his intention to pre-empt the same. The tract of land in question was within the grant of land from the United States to the B. & M. R. R. Co., and had been offered at public sale prior to the passage of the act making the grant aforesaid, but at the date of said settlement and of filing the declaratory statement it was not subject to private entry. The plaintiff, from the time of settlement until now, has resided upon and cultivated said land, and has made valuable improvements thereon. It appears from the record that the plaintiff did not make the proof required as to qualification, settlement, and cultivation, until about the first day of June, 1872, at which time he appeared at the proper land office with his witnesses and offered to prove all the facts necessary to entitle him to enter said land, and offered to pay the sum of money required to enter the same, but the register and receiver refused to permit him to enter said land, holding that by reason of his failure to prove up within one year from the date of settlement he had forfeited the same. The defendant in error now holds the legal title to the land, and in an action of ejectment recovered judgment against the plaintiff in error for the possession thereof, to reverse which the plaintiff brings the case into this court by petition in error.

Section 2,264 of the Revised Statutes of the United States provides that: "When any person settles or improves a tract of land, *subject at the time of settlement to private entry*, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement make the proof, affidavit, and payment hereinbefore required."

Sections 2,265 and 2,266, require the claimant to file his application within three months from date of the settlement.

Section 2,267 provides that: "All claimants of pre-emption rights under the two preceding sections shall, when no shorter period is prescribed by law, make the proper proof and payment

for the land claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notice has expired."

On the sixth day of March, 1868, Congress passed an act proing that "nothing in the act approved July 1, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure the government the use of the same for postal, military, and other purposes,' and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even numbered sections along the routes of the several roads therein mentioned, which have been or may be hereafter located; *Provided*, That such sections shall be rated at two dollars and fifty cents per acre, *and subject only to entry under those laws;* and the Secretary of the Interior be, and he is hereby authorized and directed to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even-numbered sections of land belonging to the government, and now withdrawn from market, on both sides of the Pacific Railroad and branches, wherever said road and branches have been definitely located."

The B. & M. R. R. extension is one of the branches referred to in the above act, and the lands within the limits of the grant belonging to the United States are not subject to private entry, and were not at the time the plaintiff settled upon the land in dispute.

It is only in cases where lands are subject to private entry *at the date of settlement* that payment must be made within a year.

This provision was incorporated into the pre-emption law of September 4, 1841, and although section ten of that act provided that no sections of land reserved to the United States alternate to any other sections granted to any of the States for the construction of any canal, railroad, or other public improvement, should be liable to entry under the provisions of that act, yet afterwards, when this restriction was removed, and lands within the grant were thrown open to settlement under the pre-emption laws, but were not subject to private entry, they are to be treated in the same manner as unoffered lands, and a party pre-empting any portion of the same has thirty months after the date of filing his declaratory statement in which to make final proof and pay for the land.

In *Towsley* v. *Johnson*, 1 Neb., 95, this court say: "The object of the guards thrown around the privilege of pre-emption by the law is to secure on the public lands actual, permanent settlers." The plaintiff in this case is shown to be an actual permanent settler, who went upon the land in question for the purpose of cultivating the same and making his home thereon.

Can the same be said of the defendant? Has there ever been an actual *bona fide* attempt even, by him, to make an actual settlement on the land in question? If so, the record fails to disclose it.

The claim of danger, in a peaceable law abiding community, evidently afforded a convenient pretext for not residing on the land, but is not entitled to much consideration. The equities of the case are clearly with the plaintiff. The jurisdiction of a court of equity is undoubted to determine the rights of the parties. *Johnson* v. *Towsley*, 13 Wall., 73. 1. Nev., 95. And under the code, an equitable defense may be set up in an action of ejectment.

The judgment of the district court is reversed, and judgment is entered in favor of the plaintiff—the plaintiff to pay to the clerk of this court for the defendant, within ninety days, the amount paid by him for entering said land, with interest to the date of payment, and that thereupon the defendant shall convey the legal title to the plaintiff. *Judgment accordingly.*

1. If the land be temporarily withdrawn from entry by the removal of the land office, after the pre-emption filing has been made, the time which the office was closed will not be computed as part of the time in which final proof should be made, neither will the pre-emptor be required to file a new claim in such new office. *Beaty* v. *Sale* 43 Ill., 351.

FRANCIS G. STARK, appellant, *v.* EDGAR A. BALDWIN, appellee.

Supreme Court of Nebraska.—January Term, 1878.—7 Nebraska, 114.

1. PUBLIC LANDS OF THE UNITED STATES; PRE-EMPTION.—Where it is sought to deprive a party of his right to pre-empt lands belonging to the United States, upon the ground that he is disqualified, by reason of a former filing upon offered lands, from availing himself of the benefits of the act of September 4, 1841, the burden of proof is on the party asserting such disqualification, and he must establish by clear and satisfactory evidence, the fact that the party seeking to pre-empt has previously filed his declaratory statement upon lands subject at the time to private entry.
2. GRANT TO B. & M. R. R.—Lands within the B. & M. R. R. grant are

not subject to private entry, and in regard to settlement and entry under the homestead and pre-emption laws are to be regarded as unoffered lands.

3. PRIORITY OF SETTLEMENT.—Other things being equal, priority of settlement determines the rights of parties in cases arising under the homestead and pre-emption laws.

4. Where the party making the prior settlement has in all respects complied with the law, he is entitled to the lands without regard to anything which a party making a later settlement thereon may have done.

APPEAL from the District Court for Lancaster county. Tried before POND, J., who found upon the issues joined in favor of the defendant.

The opinion states the case.

W. F. Chapin, *J. M. Robinson*, and *G. W. Lowley*, for appellant.

1. The Secretary of the Interior decided against Stark for the simple reason that he had previously, as was claimed by said secretary, had a filing on lands subject to private entry, and that filing prevented him from making any other valid filing on lands, which were not subject to private entry. The land in controversy, though once offered and subject to private entry, became, by the withdrawal for railroad purposes, unoffered, or not subject to private entry: it was also taken out of the class of lands subject to private entry by having been covered by a homestead entry. *Stalnaker* v. *Morrison*, 6 Neb., 362. 2 Lester, p. 129, sec. 19, pp. 238 and 239, p. 259, sec. 6.

2. The decision of the land department that Stark had a previous filing, and for that reason was not a qualified pre-emptor is not conclusive, but may be examined, reviewed, and passed upon by this court. *Smiley* v. *Sampson*, 1 Neb., 70 and 74. *Shepley* v. *Cowan*, 1 Otto, 330.

Cobb and *Marquett* for appellee.

MAXWELL, J.

On the thirteenth day of June, 1864, the plaintiff entered as a homestead the northwest quarter of the northeast quarter, and the north half of the northwest quarter of section 19, in Township 10, Range 7, east of the sixth principal meridian, in Lancaster county, the land being within the grant to the B. & M. R. R. Co. Afterwards, apparently being under the impression that he could not

perfect his title to the same, he sold his claim for a trifling sum, and removed from the land. The party to whom he sold the claim appears to have been unable to enter the land, and in the year 1867, the plaintiff again removed on to the land in controversy, erected a dwelling-house thereon, and has continued to reside on said land until the present time.

On the seventeenth day of June, 1870, the plaintiff tendered to the register of the proper land office his declaratory statement of his intention to pre-empt said land, under the provisions of the act of September 4, 1841, and offered the necessary proof to entitle him to pre-empt the same, together with the amount of money required in payment therefor. His right to make the pre-emption was rejected upon the ground that the land had reverted to the B. & M. R. R. Co.

On the twenty-eighth day of April, 1871, the Secretary of the Interior decided that lands, situated like those in controversy, reverted to the United States, and not to the railroad company, and on the tenth day of June, 1871, the plaintiff again appeared before the officers of the proper land office, and "offered to prove up and pay for said lands."

On the twenty-third day of August, 1870, Charles E. Van Pelt settled upon said land, and tendered to the receiver of the proper land office his declaratory statement of his intention to pre-empt the same. The statement was refused upon the ground that the land had reverted to the railroad company.

Afterwards, on the tenth day of June, 1871, Van Pelt obtained a soldier's homestead on said land, and twelve days thereafter he pre-empted the same, dating his settlement June 20, 1870.

The plaintiff contested the right of Van Pelt to enter said land, and the case was finally decided against the plaintiff, and in favor of Van Pelt, by the Secretary of the Interior.

On the twenty-third day of June, 1873, Van Pelt and wife conveyed the land in controversy to the defendant herein.

In the year 1874, the defendant commenced an action of ejectment against the plaintiff to oust him from said premises.

This is a suit in equity to restrain the defendant from prosecuting said action, and to require him to convey the legal title to said land to the plaintiff.

The case appears to have been decided against the plaintiff herein by the Secretary of the Interior, upon the ground that he had previously filed upon lands subject to private entry.

From a careful inspection of the record in the case, we are of the opinion that the testimony entirely fails to establish the fact. The plaintiff and two other witnesses deny positively that he made the filing said to have been made by him in Dodge county about the year 1860.

Where it is sought to deprive a party of his right to pre-empt lands belonging to the United States, upon the ground that he is disqualified, by reason of a former filing from availing himself of the benfits of the act of September 4, 1841, the burden of proof is on the party asserting the disqualification. And he must establish, by clear and satisfactory evidence, the fact that the party seeking to pre-empt has previously filed his declaratory statement upon lands subject at the time to private entry.

The lands in controversy, being within the railroad grant, were not subject to private entry, and in regard to settlement and entry were to be regarded as unoffered lands. See *Stalnaker* v. *Morrison*, 6 Neb., 363.

The plaintiff made an application to file his declaratory statement of his intention to pre-empt said lands in June, 1870. His claim was rejected upon the sole ground that the lands belonged to the railroad company. Afterwards the Secretary of the Interior having decided that the lands in question had reverted to the United States, and were open to settlement under the homestead and pre-emption laws, the plaintiff, who had continued to reside thereon, endeavored to renew his filing and to enter said land under the pre-emption laws. The application was refused and the right of pre-emption denied.

That the plaintiff settled upon the lands in controversy before Van Pelt, and was actually residing thereon with his family at the date of Van Pelt's settlement, there is no question.

Therefore, if he has in all respects complied with the law, he is entitled to the land without regard to anything which Van Pelt or defendant may have done.

Other things being equal, *priority* of settlement determines the rights of the parties in cases arising under the pre-emption law. *Towsley* v. *Johnson*, 1 Neb., 100.

As in our opinion the plaintiff conformed to the requirements of the pre-emption law, he has the equitable title to the lands in controversy.

It follows that the judgment of the district court must be reversed, and a proper decree is entered in this court in favor of

the plaintiff. The plaintiff to pay to the clerk of this court, within ninety days, the amount paid by Van Pelt for entering said land, together with the fees for entering the same, and interest on said sums to date of payment. The money to be paid to the defendant, who shall thereupon convey the legal title to said lands to the plaintiff. *Decree accordingly.*

HENRY BRILL AND AGESILAUS ROCKAFELLER *v.* ELIAS B. STILES AND FREDRICK A. SOULE.

Supreme Court of Illinois.—April Term, 1864.—35 Illinois, 305.

EQUITABLE TITLE: *By payment of purchase money and receiving written agreement to convey.*—A purchaser of land by agreement acquires an equitable title when he has completed his part of the contract by paying the purchase-money and receiving written evidence of the agreement of the vendor to convey the premises.

SAME: *Available in equity, but not at law.*—Such a title may always be asserted in a court of equity, against the holder of the legal title, whether in the vendor or his vendee with notice. But at law such a title is not regarded and is unavailing for a recovery or defense against the legal title.[1]

SAME: *Entry and purchase of government land.*—A purchase of land of the government, when made in pursuance of law, and the payment of the purchase-money therefor and receipt of a certificate of purchase, confer upon the purchaser the equitable title to the premises, to the same extent as a sale by an individual owning the fee.[2]

SAME, SAME: *Priority of register's certificate over patent issued on a junior entry.*[3]—Where a party entered land with a military land warrant, the sale in such case being subject to be defeated, upon proof being made within thirty days of a right to a pre-emption, which, however, was not made, and his vendee went into actual possession of the land, but no patent was ever issued on such entry; and subsequently to his so taking possession, the land was entered by, and a patent issued to another person whose grantee brought ejectment against the said person in possession: *Held*, on a bill filed to establish the prior entry and to enjoin the prosecution of such ejectment, that the register's certificate to complainant's grantor being prior in point of time to the patent issued on the subsequent entry, it conferred an equitable title, until the purchase was legally vacated, entitled to protection against such subsequent patent.

TITLE: *Derived from government; validity of, how determined.*—In determining upon the validity of a title derived from the government, the same rules apply as if from an individual.

CANCELLATION OF ENTRY: *By Commissioner of General Land Office, concludes no one.*[4]—The mere fact that an entry of land has been declared void and canceled by the Commissioner of the General Land Office will not have the effect of vacating the entry. He is not a judicial officer, and has no power to decree the rescission of contracts; and his determination as to the validity of the sale concludes no one in his rights.

CHANCERY PRACTICE: *Motion to dismiss bill for want of equity.*[5]—The equity of a bill can only be questioned on demurrer or on the hearing. Whether a bill shows a right to relief cannot be determined upon motion.

SAME: *Same.*—Where, after answer filed and replication thereto, the defendant moved the court to dismiss the bill for want of equity, which motion was allowed and a decree entered accordingly, it was *Held*, that this motion could only be considered as an oral demurrer, and that defendant by interposing his answer to the bill had waived the right to demur. The cause should have been set down for hearing upon bill, answer, replication, and proofs.

SAME: *Defendant cannot both demur to and answer the same allegation.*—A defendant in chancery cannot both demur to and answer the same allegations at one time. After answer it is too late to demur, unless the answer is first withdrawn.

ERROR to Circuit Court of Lee County.

Bill in equity filed by plaintiffs in error against defendants in error.

The case is sufficiently stated by the court.

James K. Edsall for plaintiffs in error.

Geo. P. Goodman for defendants in error.

WALKER, C. J.:

This was a bill in chancery filed to establish a prior entry of a tract of land from the United States government, and to enjoin a suit in ejectment, instituted for a recovery, under the junior entry. The bill alleges, and the answer admits, that Rockafeller entered the premises in controversy, at the proper land office, on the 17th day of December, 1853, and received a certificate of purchase for the same. That being entered with a military land warrant, the sale was subject to be defeated by a pre-emption being proved at any time within thirty days arter the sale. The bill alleges that no such pre-emption was proved within thirty days after the entry of Rockafeller. The complainant purchased the land of him, on the 16th day of September, 1854, and went into the actual possession of the same, and had so continued till the time he filed the bill.

It likewise appears from the bill and answer that Soule entered the land, at the same office, on the 16th day of June, 1855. Upon this latter entry a patent was issued, dated on the first day of November, 1855, and that Soule conveyed to Stiles on the 18th day of July, 1856. It also appears that no patent ever issued on the first entry made by Rockafeller. The answer admits all the material charges in the bill, but seeks to avoid their operation by the allegation that the first entry, for some cause unknown to defendant, was void, and the Commissioner of the General Land Office so decided, and vacated the entry. A replication was filed to the answer.

Afterwards, defendant moved the court to dismiss the bill for want of equity, which motion was allowed and a decree entered accordingly, to reverse which this cause is brought to this court.

A purchaser of land by agreement acquires an equitable title, when he has completed his part of the contract by paying the purchase-money, and receiving written evidence of the agreement of the vendor to convey the premises.

Such a title may always be asserted in a court of equity against the holder of the legal title, whether in the vendor or his vendee, with notice. But at law, such a title is not regarded, and is unavailing for a recovery or defence against the legal title. Such a purchase of the government, when made in pursuance of law, confers upon the purchaser the equitable title to the premises, to the same extent as a sale by an individual owning the fee. (*Rogers* v. *Brent*, 5 Gilm., 573.) In determining upon the validity of a title derived from the government, the same rules apply as from an individual.

In the case of *Isaac* v. *Steel*, 3 Scam., 97, it was held that, in equity, a junior patent or register's certificate of entry will prevail over the elder one, if the right on which it is based is prior, in point of time, to that upon which the elder patent or certificate is founded. And in the case of *Bruner* v. *Manlove*, *Id.*, 339, the same rule is announced and adhered to.

It then follows from these authorities, that the register's certificate of purchase to Rockafeller, being prior in point of time to the patent issued to Soule, it conferred an equitable title until that purchase was legally vacated. The certificate itself provided that it might be done, upon proof being made, within thirty days, of a right to a pre-emption. But there is no pretence that there

was any such proof made. Nor does it appear that the first entry was illegally made.

It is true that the answer alleges the entry was void and had been canceled by the Commissioner of the General Land Office. But no reason is given or facts shown why that entry was void. The mere fact that it was so declared by the Commissioner of the General Land Office, did not have the effect of vacating the entry. He is not a judicial officer, and has no power to decree the rescission of contracts. His determination in reference to the validity of that sale concluded no one in his rights. (*Rogers* v. *Brent*, 5 Gilm., 573, and authorities there cited.)

The power to adjudge and determine upon the validity of a contract, and to hold them void, devolves alone upon the judiciary. The cancellation of the entry by the commissioner was not, therefore, evidence that the first entry was illegal, but that should have been shown by other and legitimate evidence. And until proved to be void, it was binding upon the government, and its subsequent grantees. Nor could the agents of the government, by any act of theirs, prejudice the rights of those claiming under Rockafeller. If the entry was authorized by law, the title passed to him, subject only to be defeated by proof of a right of pre-emption, and if unauthorized, he acquires no title. But until it is shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable title.

According to the uniform practice in courts of chancery, the equity of a bill can only be questioned on demurrer or on the hearing. Whether a bill shows a right to relief, cannot be determined upon motion. In this case, the cause should have been set down for hearing upon bill, answer, replication and proofs. The defendant, by interposing his answer to the bill, waived the right to demur, and this motion can be considered nothing else but an oral demurrer. He could not both demur to and answer the same allegations at one time.

After answer, it is too late to demur unless the answer is first withdrawn. The court below having erred in dismissing the bill, the decree must be reversed and the cause remanded.

Decree reversed.

NOTE.—1. *Wales* v. *Bogue*, 31 Ill., 323; *Chiniquy* v. *Catholic Bishop*, 41 *Id.*, 148; *Franklin* v. *Palmer*, 50 *Id.*, 252; *Fischer* v. *Eslaman*, 68 *Id.*, 78; *Vallette* v. *Bennett*, 69 *Id.*, 632.

2. See *McDowell* v. *Morgan*, 28 Ill., 528; *Bester* v. *Rankin*, 77 *Id.*, 289, 292; *Aldrich* v. *Aldrich*, 37 *Id.*, 32; *Baty* v. *Sale*, 43 *Id.*, 351; *Robbins* v. *Bunn*, 54 *Id.*, 48.

3. See *Aldrich* v. *Aldrich*, 37 Ill., 32; *Baty* v. *Sale*, 43 *Id.*, 351; *Robbins* v. *Bunn*, 54 *Id.*, 48; see, also, *Bester* v. *Rankin*, 77 Ill., 289, where the doctrine of *bona fide* purchaser was applied.

4. See *Baty* v. *Sale*, 43 Ill., 351.

5. See *Judson* v. *Stephens*, 75 Ill., 255.

THE UNITED STATES *v.* THOMAS MCENTEE.

United States District Court.—District of Minnesota, 1877.

(*Taken from Copp's Land Owner, December No.*, 1877.)

The right to cut timber on the public domain by homestead settlers, limited to purposes of cultivation.

This is an action to recover the value of a large quantity of timber cut by the defendant upon a section alleged to be a portion of the public lands, and removed therefrom.

It is claimed by the defendant that the timber was cut upon a tract of land entered by him under the act of Congress, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers upon the public domain." It was undisputed that the timber was cut down upon land for which the defendant had paid the entry fee and made an affidavit required by the law, April 12, 1874. There was some evidence tending to show that the timber was cut for purposes of traffic and sale alone. The court was requested to instruct the jury, "that if the defendant had made an affidavit and paid the entry fee for the land, he was entitled to cut and remove the timber thereon for any purpose whatever."

Wm. W. Billson, United States District Attorney, for government.

J. J. Egan and *William W. Erwin*, for defendant.

NELSON, J., charged the jury as follows:

I decline to give the instruction requested. The defendant has attempted to show that the timber was cut upon his homestead, as the land was being put in suitable condition for cultivation, so that the title thereto might be perfected. If you so find, the

verdict must be against the government; but, if you should determine the proof showed the cutting and removal were for sale and traffic alone, then a question is presented—an important one—what rights and privileges are secured by virtue of an entry under the homestead law before a patent has issued?

Until 1862, Congress had passed no general law offering the public domain in a limited quantity to any person, the head of a family, who would cultivate and make a permanent home thereon. Pre-emption laws securing the rights to enter land by purchase at a minimum price fixed per acre, had been enacted, and donation laws applicable to particular States had been passed, but the liberal policy of offering homesteads had not been before extended to all persons. There can be no doubt it is a wise policy and beneficial in its results. The quantity of land is limited to 160 acres, the patent is not issued until after proof of residence upon, and cultivation for the term of five years, and no land acquired under the act shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. If there is an actual change of residence or abandonment of the land for more than six months at any time before the expiration of the five years, the land entered will revert to the United States.

It becomes an important question, then, if the homestead entry is wholly timber land, or nearly so, as in this case, what rights and privileges with reference to the timber are acquired. Congress, by this law, intended to foster and encourage the agricultural interests of the country and induce settlement of the vast vacant public domain, and secure permanent homes to settlers. Everything necessary for the cultivation of the land and manifesting an intention to make permanent occupancy and *bona fide* settlement, is legitimate and proper to be done. The land can be cleared and timber sold, if cut down for the purpose of cultivation; but if sale and traffic is the only reason for severing the timber, and it is not done with a view of improving the land, the intentions of the law-giver are subverted.

Each case, however, must depend upon its attendant circumstances, and it is a question of fact for the jury to determine, whether the person claiming the benefit is acting in good faith. I know of no better rule to apply than the one adopted in the case of a lessee for life or a term of years, charged by his lessor with waste. If the land leased is wild and uncultivated and wholly

covered with timber, the lessee would undoubtedly have a right to cut so much as may be necessary for cultivation, and the extent to which timber may be cut is always a question of fact for a jury. Unless there is something exceptional, which does not appear, defendant could not sever all timber and sell it, without making some provision for fences and other necessities of his farm, and such as he does cut and sell must be incident to the improvement of the land. A little common sense and good judgment applied to the facts in this case will give a correct verdict.

The jury found for the plaintiff.

NOTE.—One who has entered land under the homestead act and continues to reside thereon, is entitled to riparian rights in the use of water thereon. *Union M. & M. Co.* v. *Dangbery*, 2 Sawyer, 450.

In an action of trespass by the United States, the defence of a right of pre-emption to the land cannot be set up where no steps have been taken to secure the pre-emption right. *United States* v. *Brown*, 4 McLean, 378.

WILLIAM H. SEYMOUR ET AL. *v.* DANIEL SANDERS AND WIFE.

U. S. Circuit Court District of Minnesota, 1874.—3 Dillon, 437.

Public Lands.—Homestead Act.—Exemption Provision.

1. The fourth section of the homestead act of Congress of May 20th, 1862, (12 Stats. at Large, 393), which provides that no lands acquired thereunder shall in any event become liable to any debt contracted prior to the issuing of the patent therefor, is valid and binding upon the States.
2. The power of Congress to dispose of the public domain, and the policy of the above exemption provision in the homestead act, considered.

BEFORE DILLON AND NELSON, JJ.

This was an action of ejectment to recover possession of eighty acres of land in Goodhue county, Minnesota.

The plaintiffs allege that they were owners of the land November 1st, 1872, and that the defendants unlawfully detain the same.

The defendants in their answer allege that ever since April 10th, 1868, they have been, and before that time were, and still are, owners in fee of said lands and are in possession thereof, and that Daniel Sanders duly entered it at the local land office under the home-

stead act of Congress (12 Stats. at Large, 392), and holds and occupies it as a homestead with his family, and that no patent has ever been issued.

The cause was tried on a stipulation as to the facts. From this stipulation it appears that Daniel Sanders, on March 14th, 1863, settled upon, improved and entered, one hundred and sixty acres of the public lands under the said homestead act. That he complied with said act and proved, perfected and completed his right to a title on April 10th, 1868, and on that day became entitled to a patent and received the final certificate, signed by the proper receiver of the United States Land Office. It does not appear that the patent has yet issued. The plaintiffs obtained judgment in the State court against Daniel Sanders on May 25th, 1868, and on the same day docketed it in the office of the clerk of that court in Goodhue county, where the land was situated.

By General Statutes of Minnesota, pp. 485, 486, sec. 254, judgments are liens on all the real property of the judgment debtor in the county, or afterwards acquired by him.

The plaintiffs issued execution on this judgment August 30th, 1871, and Sanders selected and the sheriff set off to him as exempt, the south half of the said 160 acres, under the State exemption laws (Gen. Stats. of Minnesota, p. 498, ch. 18), and sold the north half (being the land in dispute) to the plaintiffs on October 21st, 1871. One year from such sale expired and no redemption was made from the sale, and under the statute the certificate became evidence of absolute title in plaintiffs without further conveyance. (Gen. Stats. of Minnesota, p. 491, sec. 290.)

Daniel Sanders made a deed of this eighty acres of land to his wife, Mary Ann Sanders, on April 23d, 1868, and for that reason she is made a defendant. This deed was not recorded until June 24th, 1869. By the Gen. Stats. of Minnesota, p. 500, sec. 2, such a deed is permitted if the conveyance contains a power of disposition by deed, will, or otherwise (*Leighton* v. *Sheldon*, 16 Minn., 243), but is void as to his creditors unless recorded in proper registry within seventy days after its execution and delivery. This deed does not contain such power and was not so recorded. The plaintiffs were his creditors, and as such claim that the deed to the wife was void. The stipulation provides that if the fourth section of the homestead act, so called (12 Stats. at Large, 392), is, in its application to this case, constitutional, and a valid and binding regulation of the judicial power and policy of the State of

Minnesota, and paramount to the State laws and regulations in regard to exemptions from levy and sale on writs of execution, then judgment shall be given for the defendants, otherwise for the plaintiffs.

The Gen. Stats. of Minnesota, p. 448, sec. 269, provide that all property, real, personal or mixed, belonging to the defendant in the execution may be levied upon and sold. But by the same statute, p. 498, sec. 1, it is provided that a homestead in quantity not exceeding eighty acres and the dwelling house thereon, to be selected by the owner thereof, and owned and occupied by any resident of this State, shall not be subject to levy or sale upon execution.

The act of Congress approved May 20th, 1862, (12 Stats. at Large, 393), provides that no lands acquired under that act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

By the act of Congress approved February 26th, 1857, (11 Stats. at Large, 167, sec. 5), authorizing the people of Minnesota to form a constitution, it was provided that the State should "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress might find necessary for securing the title in said soil to *bona fide* purchasers thereof." These provisions were incorporated into the State constitution (art. 2, sec. 3), and were ratified by a vote of the people. The State was admitted into the Union May 11th, 1858, on an equal footing with the original States.

Charles C. Wilson, for the plaintiffs.
C. and J. C. McClure, for the defendants.

DILLON, Circuit Judge:

Congress is invested by the constitution with the express power of disposing of and making all needful rules and regulations respecting the public domain. This gives to Congress authority to dispose of the public lands without limitation, and leaves to its discretion the mode of disposition. (*United States* v. *Gratiot*, 14 Pet., 526.)

If the land here in question were within one of the territories of the United States, it would hardly be doubted that Congress could lawfully provide in an act for the disposal of the public lands, that it should not be liable for debts contracted by the

homestead settler prior to the issue of the patent. This the learned counsel for the plaintiffs conceded, but they claim that sec. 4 of the homestead act of Congress of May 20th, 1862, should be limited in its application to the public domain outside of the respective States. But the power of Congress within the limits of the State of Minnesota, is, in our judgment, precisely the same as respects the modes and purposes of disposing of the public lands, as it is within the territories.

Over the public lands, so far as concerns their disposition, whether as to time, mode or objects, the State has no authority whatever. On the other hand, the authority of Congress is paramount and exclusive. Any question upon this subject which might otherwise exist, growing out of the respective powers of the State and federal governments, is precluded by a solemn compact in the act providing for the admission of the State, and in the constitution of the State itself, to the effect that the State would "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress might find necessary for securing the title in said soil to *bona fide* purchasers thereof."

Thus the plenary power of Congress over the disposition of the public lands within the State is expressly recognized to exist by the organic law of the State: and we hold that Congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

The title to all public lands must pass and vest according to the laws of the United States. (*Wilcox* v. *Jackson*, 13 Pet., 498, 517.) And undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to State legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which Congress disposes of the land.

It has been expressly adjudged by the Supreme Court that Congress cannot be confined to any particular mode of disposition, but may lease or otherwise dispose of the public domain in its discretion. (*United States* v. *Gratiot*, *supra*.)

Down to 1862, Congress had never adopted the policy of offering the public lands to those who would cultivate and make permanent homes upon them, and the act of May 10th, of that year, is the first homestead law of the general government. It

would be difficult, perhaps, to point to any enactment of the federal Congress more wise in conception, just in policy, and beneficial in results, than this. And these benefits were chiefly to the States by securing therein at an early day a large body of permanent settlers upon the public lands. By the act a quantity of land not exceeding 160 acres is given to any head of a family possessing the required qualifications, on condition of settlement, cultivation, and continuous occupancy as a home by the settler for the period of five years. During this period the settler is prevented from alienating any part of it, or from making any actual change of residence, or from abandoning the land for more than six months at any time. If he complies with the provisions of the act, he becomes entitled to a patent at the end of five years.

Section 4, the validity of which, in its application to this case, is the question to be settled, is in these words: "No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor."

It is not difficult to discover the reason for this provision. A leading object of the enactment was to benefit the poor man who was unable to buy the lands at government price and receive his title at once and without conditions; and it undoubtedly occurred to Congress that many persons who had been unfortunate and were insolvent would avail themselves of the act; and conceiving that the creditor in such cases had no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government, and to protect the debtor and to encourage persons to settle upon the public domain under the act, the fourth section was adopted. In the case before us the debt upon which the plaintiffs obtained judgment was created after the defendant had settled upon the land under the homestead act of Congress, and before the expiration of the five years, so that the creditor was all along apprised that the land was not liable to the payment of his debt, and certainly he is without just ground of complaint against the exemption. His legal ground of objection, however, is that the exemption is an invasion of the lawful rights of the State, and conflicts with her laws, which exempt only 80 acres of land to the debtor. It will be observed that Congress does not attempt to exempt the land from debts contracted after the patent had issued, or, in other words, after the title has passed

from the general government. Before the title has thus passed, Congress, under its power to dispose of the public lands, may prescribe the terms and condition upon which the disposition shall be made, and as against the State, it is our judgment that it was competent for Congress as incidental to the power of disposal of the lands, and to promote the enlightened and humane policy it had in view, to provide that the lands acquired by the homestead settler should be held by him free from all antecedent debts.

This question, which is one of great practical moment, and affecting, as counsel inform us very many persons, does not appear to have before arisen for judicial determination, but we feel quite confident that our conclusion is correct.

Agreeably to the stipulation of counsel, in case we should be of opinion that the fourth section of the act is valid, judgment will be entered for the defendant.

NELSON, J., concurs in the foregoing, and is of opinion also that the same result follows from the fact that no patent has ever emanated from the government, and hence the plaintiff not having legal title cannot maintain ejectment.

Judgment for defendants.

NOTE.—*Held*, the same in *Gile* v. *Hallack*, 33 Wis., 523; and *Patton* v. *Richmond*, 28 La. Ann., 795.

And the fact that the judgment was rendered after the patent had been issued, and the exemption was not claimed by the patentee but by his grantee, can make no difference. *Miller* v. *Little*, 47 Cal., 348; and *Russell* v. *Louth*, 21 Minn., 167.

By commuting and paying for the land under the 8th section of the homestead act, the entry is not changed from a homestead to a pre-emption entry, and the fact that the land was not occupied as a homestead at the time of the sale, and that the homestead party stood by at such sale and made no objection to the sale, can make no difference; such sale is null and void. *Clark* v. *Bayley*, 5 Oregon, 343.

OAKS *v.* HEATON *et al.*

Supreme Court of Iowa.—December Term, 1876.—44 Iowa, 116.

1. PUBLIC LANDS; HOMESTEAD ACT; CONTRACT.—An occupier of land under the homstead act of 1862, cannot make a valid contract that he will convey the land when he shall have acquired the legal title thereto.

2. RULE APPLIED.—O. had pre-empted a quarter-section of government land, and had made valuable improvements thereon, when he agreed with H. that if the latter would take possession and perfect a title under the homestead act, he would relinquish his rights already acquired, and should receive in consideration therefor a deed to half of the land when the title should be perfected; *Held*, that the agreement was in violation of the provisions of the homestead act of the United States, and could not be enforced.

APPEAL from Plymouth Circuit Court. Thursday, October 5.

The plaintiff alleges in his petition, in substance, that on the 5th day of July, 1870, he held a valid claim under the pre-emption laws of the United States, and under the laws of Iowa, to the southeast quarter of section number thirty-six, in Township number ninety-two, of Range forty-eight, and was then, and from about April 1, 1870, had been in possession of and residing on the same: and had erected a good, substantial dwelling-house, and made valuable improvements thereon, amounting in value to over five hundred dollars. That on or about said 5th day of July, at the solicitation of the defendant, Lucius R. Heaton, plaintiff was induced to sell to the said Lucius R. Heaton plaintiff's claims to, and interest in said land, upon the following terms: Plaintiff agreed to relinquish his pre-emption right to said land, and Lucius R. Heaton agreed to take and hold the same and perfect his title thereto, under the homestead laws of the United States, and when he had thus perfected his title to said land to convey to plaintiff, by a good and sufficient deed, the west half of said quarter-section. That plaintiff in the meantime continued, and still continues in the possession of the west half of said land. That, in accordance with said agreement, plaintiff relinquished his pre-emption claim to said quarter-section, and Lucius R. Heaton entered the same under the homestead laws of the United States, and went into the occupancy and possession of the east half of said quarter-section.

That, for the purpose of more fully carrying out said agreement and reducing it to writing, so far as could reasonably be done, the said Lucius R. Heaton and Nancy J. Heaton, his wife, for the consideration aforesaid, which was agreed upon and fixed at five hundred dollars, executed and delivered to plaintiff, on or about the 17th day of August, 1870, a special warranty deed, conveying to plaintiff all their right, title, and interest in and to the west half of said quarter-section.

That on or about the 18th day of November, 1872, Lucius R. Heaton proved up and filed in the proper United States land office the requisite proof to entitle him to a patent from the United States for the said quarter-section, under said homestead laws, and received from the proper officers of the land office a certificate entitling him to receive a patent.

That since proving up and obtaining said certificate, Lucius R. Heaton utterly refuses to convey to plaintiff the west half of said quarter-section, and has declared to plaintiff that he never had any intention, at any time, of so doing.

That ever since the 5th day of July, 1870, the plaintiff has continued to reside with his family on the west half of said quarter-section; that for more than a year past he has had sixty acres of the same under cultivation; that he paid the defendant Heaton $50 for breaking a portion of the same, and has made other improvements, exceeding in value $800.

That the defendants, Lucius R. and Nancy J. Heaton, confederated with the defendant, Samuel E. Day, to defraud the plaintiff of his rights in the premises, about the 13th day of January, 1873, executed and delivered to Samuel E. Day, for the nominal consideration of $1,150, a duly acknowledged warranty deed for said quarter-section, and the said Samuel E. Day executed and delivered to Lucius R. Heaton a duly acknowledged mortgage deed of said premises, nominally for the purpose of securing to Heaton the sum of $1,050, in certain instalments.

That Samuel E. Day had actual notice of the special warranty deed to plaintiff and of plaintiff's claim to the west half of said quarter-section, and that said Day paid no consideration for said quarter-section, and that the warranty deed and mortgage were executed to give color of title to Day, in order to cheat and defraud the plaintiff.

That the defendants, Day and Lucius R. Heaton, threaten to divest plaintiff of the west half of said quarter-section, and of his improvements thereon.

Plaintiff prays that the deed to Day, and the mortgage to Heaton, be declared fraudulent and void, so far as the west half of said quarter-section is affected; that plaintiff be decreed to be the owner thereof, and the defendants, Lucius R. and Nancy J. Heaton, be ordered to convey the same to him.

The defendants filed answers denying most of the material allegations of the petition, and cross-petitions asking affirmative

relief. Afterwards the defendants file an amendment to their answers, as follows: "That, as alleged by plaintiff, the defendant, Lucius R. Heaton, did take the southeast quarter of section thirty-six, in Township ninety-two, of Range forty-eight, Plymouth county, Iowa, as a homestead, under the homestead laws of the United States, to wit: An act of Congress entitled an act to secure homesteads to actual settlers on the public domain, approved May 20th, 1862, and acts amendatory thereto, and that by the terms of said homestead law, all parties are prohibited from taking such homesteads for the use and benefit of any other person, and are prohibited from making any alienation of such lands while held as homesteads, and such taking for the use of another or alienation renders such entry void, and that the agreements and contracts set forth in paragraphs 4, 5, 6, and 'Exhibit A,' of plaintiff's petition, are wholly illegal and void, and in violation of said homestead act, and the plaintiff can recover nothing upon said alleged agreement, and the same is a fraud upon said act, and the plaintiff is a *particeps criminis* in the perpetration thereof."

The court decreed that plaintiff is the owner of the west half of the quarter-section in controversy, and quieted his title thereto. The defendants appeal. It is agreed that the action shall be tried in this court on the following agreed statement of facts:

1. All the material facts and statements in plaintiff's petition shall be taken and considered as true, that have any bearing on the issues joined thereon, in defendants' amendments to their answers, upon which issues alone defendants prosecute their appeal.

2. It is agreed and admitted in addition that, prior to April 6, 1868, Oaks had built a good, substantial dwelling house, of hewn logs, one and one-half stories high, on the quarter-section in controversy. That, April 6, 1868, he took possession with his family and has lived there ever since. That, during the spring of 1868, he broke and planted ten acres; in July, built a stable 12x18; in October, an addition thereto, 20x20; in the summer, built a cow yard ten rods square, and in the fall, plowed eight furrows around the quarter-section. That, in the spring of 1869, he broke seven acres more, and put all the plowed land in crops, and planted 500 cottonwood, and some maple and mulberry trees, and in the summer, dug and constructed a substantial out-door cellar, 10x12, and in September, 1869, filed a pre-emption on the quarter-section.

That, in the spring of 1870, he broke five acres more, and put all his plowed land in crops, except five acres, which he rented to defendant, Lucius R. Heaton; and that, up to July 5th, 1870, he had made improvements on the land, costing in labor and money, more than $500. That he is a poor man, and with the exception of personal property needed for farm and family use, has no other property besides that claimed in this contest.

Argo & Ball and *C. R. Marks* for appellants.
Pendleton & Bailey for appellee.

DAY, J.:

As is apparent from the statement of facts, the sole question in this case is: Can an occupier of lands, under the homestead act of 1862, make a valid contract to convey his homestead, when he shall have acquired the legal title?

Section 2 of the act in question (12 United States Statutes at Large, 392), provides that the person applying for the benefit of this act shall, upon application to the register or receiver of the land office in which he or she is about to make such entry, make affidavit before such register or receiver that such application is made for his or her exclusive use and benefit, and that such entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and, on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified. Provided, however, that no certificate shall be given, or patent issued therefor, for the space of five years from the date of such entry; and if, at the expiration of such time, or any time within ten years thereafter, the person making such entry * * * shall prove, by two credible witnesses, that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, then he or she shall be entitled to a patent.

It is conclusively presumed that plaintiff knew of the provisions of this law. He is presumed to have known, at the time he made this contract with defendant, and accepted a conveyance for one half of the land intended to be homesteaded, that he had placed defendant in a position which rendered it necessary for him to perjure himself, before he could obtain a patent to the land. How can plaintiff be permitted to compel a conveyance, under a con-

tract which rendered it necessary that a crime should be committed, before there could be anything to convey? If plaintiff had agreed with defendant, that plaintiff would abandon his pre-emption claim in consideration that defendant would convey to plaintiff one-half the land and then go before the register or receiver of the land office, and falsely make affidavit that no part of the land had been alienated, and thus by perpetrating a fraud upon the government and committing a felony, obtain a patent for the land, no one probably would claim that any court could lend its aid to the enforcement of the agreement. Although not in words so expressed, yet such is precisely the effect of the agreement which the plaintiff seeks to enforce.

In *Dawson* v. *Merrille*, 2 Nebraska, 119,[1] it was held that the policy of the act of Congress, granting homesteads on the public lands, is adverse to the right of a party availing himself of it to convey, or agree to convey, the land before he receives a patent, and that a court will not lend its aid to the enforcement of a contract which is against public policy.

Appellee relies upon *Snow* v. *Flannery*, 10 Iowa, 318, and *Nycum* v. *McAllister*, 33 Iowa, 374. *Snow* v. *Flannery* was quite different in its facts and in its principles, from this case. Snow and Flannery settled upon different parts of the same quarter-section of public land, before survey, and both filed pre-emption claims upon the entire tract. Each remained in possession of his claim. The quarter was not subdivided and could not be entered in parts. Their rights, by actual settlement, were equal. Snow proposes to pay Flannery his share of the entrance money and withdraw his filing, if Flannery would enter the entire quarter and convey to him his share.

Flannery declined making a positive agreement before taking the pre-emption oath, but said he did not want Snow's land, and would do what was right about it. Snow withdrew his filing and Flannery entered the entire tract. There was no contract which contemplated any false swearing, or fraud upon the government.

The case of *Nycum* v. *McAlister* is still less like the present case. In that case, a mortgage was executed upon the homestead, after the homesteader had occupied five years, and was entitled to a patent, but before the patent was issued. It was claimed that the mortgage was invalid under section 4 of the homestead act, which provides "that no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of

any debt or debts, contracted prior to the issuing of the patent therefor." It was held that this provision was simply for the benefit of the settler, and was not intended to disable him from incumbering his interest before receiving the patent. The case at bar arises under a distinct, and entirely different provision of the homestead act. The court below erred in granting the plaintiff the relief asked.

Whether plaintiff would be entitled to the value of his improvements under the provisions of the occupying claimant law, this case does not involve, and we do not determine.

Reversed.

1. For opinion of Mr. Justice Crounse in this case see 3 Nebraska, 458.

GEORGE KIRKALDIE AND C. W. A. ARENZ *v.* JOHN R. LARRABEE, ELLEN M. LARRABEE, HIS WIFE, AND A. W. CUTTS.

Supreme Court of California.—October Term, 1866.—31 California, 455.

FEDERAL HOMESTEAD ACT.—There is nothing in the act of Congress of May 20th, 1862, granting homesteads to settlers on public lands which forbids a voluntary alienation of the land by the grantee who has acquired the same as a homestead.

MORTGAGE OF PUBLIC LANDS.—If one who is in possession of public lands mortgages the same in fee, and afterwards acquires title to the same under the Federal Homestead Act, he is estopped from denying the lien of the mortgage, and cannot set up a title afterwards voluntarily acquired to defeat it. Section thirty-three of the act concerning conveyances applies to mortgages as well as absolute conveyances.

APPEAL from the District Court, Tenth Judicial District, Yuba county.

On the 16th day of September, 1861, John R. Larrabee and Ellen M. Larrabee, his wife, were in possession of the southwest quarter of section five, Township thirteen north, Range four east, Yuba county, and on the same day mortgaged it to plaintiffs to secure a promissory note of even date. The land was public land at the date of the mortgage. The granting clause in the mortgage was: "Grant, bargain, sell and confirm unto the said parties of the second part, and to their heirs and assigns forever." After the execution of the mortgage Larrabee located the land as a homestead, under the act of Congress approved May 20th, 1862.

This action was brought to obtain judgment on the note and foreclose the mortgage. The answer set up as a special defence that, after making the note and mortgage, Larrabee had made an entry of the mortgaged premises as a homestead under the federal homestead law. The court below ordered a sale of the mortgaged premises, but saved from the effect and operation of the judgment "all rights, titles, and interests which defendant Larrabee has acquired or may hereafter acquire to said land under and by virtue of his said preliminary homestead entry thereof under the federal homestead law." The plaintiffs appealed from the judgment.

J. L. Ashford, for appellants, argued that the mortgage being in fee and executed before the passage of the federal homestead law of May 20th, 1862, the said act could not be considered as divesting the lien of said mortgage, and that the act did not prohibit the mortgaging of property selected as a homestead, and did not declare any liens so created thereon invalid, and must, therefore, be construed as permitting the same, and that the act only exempted the land selected as a homestead from forced sale for ordinary indebtedness, and did not exempt it from sale in satisfaction of a mortgage voluntarily executed by the mortgagor, and that the mortgage being in fee of the land the mortgagors could not set up any after-acquired right or title to defeat the lien of the mortgage; and cited *Clark* v. *Baker*, 12 Cal., 632, and thirty-third section of the act concerning conveyances, Wood's Digest, pages 103 and 104.

J. O. Goodwin, for respondents, argued the decisions in *Clark* v. *Baker*, 14 Cal., 630, *Hoffley* v. *Maier*, 13 Cal., 14, and *Whitney* v. *Buckman*, 13 Cal., 538, were made under statutes of this State in contravention of the common-law rule that a grant or release only operated upon the estate actually held and owned at the time, and therefore had no application in this case: that the Constitution gave Congress the power to make all needful rules and regulations respecting the territory and other property of the United States, and that under this power the homestead law of 1862 had been passed; that as section thirty of the act provided that "no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor," the land could not be sold to satisfy the note, it being a debt contracted before a patent

had issued. He also argued that section thirty-three of the act concerning conveyances must give way to the law of Congress.

By the Court; SAWYER, J.:

Had the deed been an absolute conveyance in fee instead of a mortgage in fee, any subsequently acquired title under our statute concerning conveyances would have inured to the benefit of the plaintiff. (Sec. 33.) The fact that the title subsequently comes from the United States would make no difference. There is nothing in the homestead act of 1862 forbidding a voluntary alienation by the grantee under that act.

The same principle applies to a mortgage of the fee. (*Clark* v. *Baker*, 14 Cal., 630.)

The title will pass not merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary contract of the party in executing the mortgage. The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating by his own act the enforcement of the lien against the property thus mortgaged. (14 Cal., 633–4. See also *Tartar* v. *Hall*, 3 Cal., 263; *Haffley* v. *Maier*, 13 Cal., 14; *Whitney* v. *Buckman*, 13 Cal., 538; *Warburton* v. *Mattox*, Morris (Iowa), 369; *Pierson* v. *David*, 1 Clarke (Iowa), 26; *Camp* v. *Smith*, 2 Minn., 173; *Hope* v. *Stone*, 10 Minn., 141; *Bush* v. *Marshall*, 6 How., U. S., 288; *Threadgill* v. *Pintard*, 12 How., 37; *Flackler* v. *Ford*, 24 How., 323; *Phelps* v. *Kellogg*, 15 Ill., 135.) We think the plaintiff was entitled to the ordinary judgment for a sale of the mortgaged property without any exception of rights subsequently acquired by the mortgagor under the homestead act of 1862.

Judgment reversed, and the District Court instructed to enter judgment in accordance with these views.

FULLER & CO. *v.* HUNT ET AL., appellants.

Supreme Court of Iowa.—December Term, 1877.

(*From Copp's Land Owner, July No.*, 1878.)

1. HOMESTEAD: *Under United States government; mortgaged prior to final proof.*—A person who has entered upon land under the act of Congress, granting homesteads to settlers, may make a valid mortgage upon the same prior to the time when he is entitled to make final proof.[1]

2. ——; ——; *Mortgage; is not alienation.*—The execution of a mortgage upon land is not alienation of it, within the meaning of the act of Congress granting homesteads to settlers on the public lands.
3. ——: *Mortgage of by husband; not valid against wife; good against grantee of mortgagor.*—Where land is purchased of a mortgagor subject to a mortgage supposed to be valid, whether it is so or not, the mortgaged land becomes the primary fund for the discharge of the mortgage debt. Accordingly, when the husband made a mortgage upon the homestead, the wife not joining in the grant, and afterward the mortgagor conveyed the land, subject to the mortgage: *Held*, that the failure of the wife to join in the granting clause of the mortgage, could not avail the purchaser.

APPEAL from Clay District Court.

Action to foreclose a mortgage executed by the defendant, C. D. Hunt. The defendant, M. E. Griffin, is now the owner of the premises, having purchased and taken a conveyance of them subsequent to the execution of the mortgage. He disputes the validity of the mortgage upon two grounds. In the first place, at the time it was executed the title to the land was in the United States, and Hunt was occupying the same in accordance with an application and affidavit to enter it as a homestead under an act of Congress, approved May 20, 1862, entitled an act to secure homesteads to actual settlers upon the public domain. The five years occupancy had not expired, and he had not become entitled to make final proof. In the second place, he was a married man, and his wife, the defendant, M. E. Hunt, did not join in the granting part of the mortgage, but joined merely for the purpose of releasing dower, and while the premises consisted of eighty acres it is claimed that they are not worth more than $500, and so it is claimed that the mortgage has no validity, because the premises constituted the mortgagor's homestead, and the mortgage was virtually not executed on the part of the wife. The district court held both of these defenses to be insufficient, and entered a decree of foreclosure as prayed. The defendant, Griffin, appeals.

L. M. Pemberton for appellant.
J. A. O. Yeoman and *E. B. Soper* for appellees.

ADAMS, J.:

I. The first question presented is as to whether a person, who has entered upon land under the homestead act, can make a valid mortgage upon the same, prior to the time when he is entitled to make final proof.

It is claimed by the appellant that he cannot, because it is provided in the homestead act that the land shall not become liable to the satisfaction of any debt or debts contracted prior to the issuance of the patent. The debt sought to be enforced was contracted prior to the issuance of the patent. It is abundantly evident that the land could not have been reached by general execution; if the land is liable at all, it is by virtue of the act by which the debtor undertook to create a special lien upon it, and we have to say that we think that the debtor's acts have that effect: mere exemptions from execution do not prevent the debtor from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such it appears to us is the intention of the homestead act.

The only reason suggested why the claimant, under the homestead act, should not be allowed to mortgage his homestead, is that it would be against the public interest. But the fact that the act provides against alienation by the claimant, and does not provide against mortgaging, unless alienation includes mortgaging (a point which will be hereafter considered), indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead.

In *Nycum* v. *McAllister*, 33 Iowa, 374, it was substantially so held. It is true that in that case the five years had expired when the mortgage was executed, but a patent had not issued. The decision upholding the mortgage was based upon the idea that the provision of the statute that the land should not be liable for debts contracted prior to the issuance of the patent did not prevent the debtor from creating by contract a special lien.

MR. JUSTICE BECK, in delivering the opinion, said:

"The provision is intended as a shield for the debtor's protection." The debts, then, from which the land is exempted by statute, must be considered those which are enforceable against it only by general execution. We regard the case above cited as decisive of the question in this case. The fact that in that case the five years had expired does not render it inapplicable as an authority. The land was held liable for a debt contracted before the issuance of a patent. This necessitated a construction of the statute which excluded from its provisions debts charged upon the land by the debtor's own contract. The question of this expiration or non-expiration of the five years affects merely the character of

the mortgagor's interest. But it is not claimed by defendant's counsel that the invalidity of the mortgage results from a want of mortgageable interest, but simply from a disability imposed by statute upon the mortgagor.

II. Another objection is urged by the defendant's counsel upon the ground that the claimant in making final proof must show by affidavit that he has not alienated the land. The execution of the mortgage it is said is an alienation within the meaning of the statute. But we think this is not so. The giving of a mortgage may result in alienation, but it is not such of itself, nor can it be said that the mortgage is given with such purpose. Land is often mortgaged with the view of obviating the necessity of alienation. The office of a mortgage is simply to create a lien under our statute: the legal title remains in the mortgagor. Though the case would probably not be different if it passed to the mortgagee. A conveyance made merely to create a lien lacks the essential element of alienation. This has been repeatedly held in the law of insurance. *Rollins* v. *Columbian Insurance Co.*, 5 Foster. 200; *Conover* v. *Mutual Insurance Co.*, 1 Comst., 290; *Jackson* v. *Mass. Mutual Fire Insurance Co.*, 23 Pick., 418; *Hubbard & Spencer* v. *Hartford Fire Insurance Co.*, 33 Iowa. 333. So. also. it has been held that an inhibition upon selling is not an inhibition upon mortgaging. *Middleton Savings Bank* v. *Dubuque*. 15 Iowa. 394; *Krider* v. *Trustees of Western College*, 31 Iowa. 547. In *Nycum* v. *McAllister*, as we have seen, a mortgage executed by a claimant under the homestead act before the issuance of a patent was sustained. Yet by the act no patent could issue except upon proof by affidavit of the claimant that he had not alienated the land. And the fact that such affidavit is required, renders void an attempted alienation. *Oaks* v. *Heaton*. 44 Iowa. 116. We cannot then regard a mortgage as an alienation.

III. The mortgage is further assailed upon the ground that it is not sufficient in form to bind the land. In respect to forty acres of the land it might be conceded that this position is well taken. The mortgagor's wife did not join in the granting part of the mortgage, and appears to have signed merely for the purpose of releasing dower. It was held in *Sharp* v. *Bailey*. 14 Iowa. 387, that such an instrument does not bind the homestead.

It is insisted, however, that while the mortgage might be invalid as against the mortgagor, or his wife, it is not the right of a purchaser from them to set up its invalidity. Whether he could or

not, would depend upon whether he purchased the land subject to the mortgage. Where land is purchased of a mortgagor subject to a mortgage supposed to be valid, whether it is so or not, the mortgaged land becomes the primary fund for the discharge of the mortgage debt. The theory is that the amount of the mortgage is deducted from the purchase-money, and it would be inequitable to allow the purchaser to take advantage of the invalidity of the mortgage, and cast the debt upon the vendor who has virtually furnished the consideration for its discharge. Nor is it necessary in order that the land may stand primarily charged with the payment of the mortgage debt, that the purchaser from the mortgagor should have assumed its payment. It is sufficient if the land was purchased subject to the mortgage, without any personal liability being assumed by the purchaser. *Green* v. *Turner*, 38 Iowa, 112; *Russell* v. *Allen*, 10 Paige, 249; *Shuler* v. *Hardin*, 25 Ind., 386; Jones on Mortgages, sec. 736. The question then is, as to whether Griffin purchased subject to the plaintiff's mortgage. If he had taken a deed with a covenant against incumbrances, it would be presumed that he did not. But he took a quit claim deed, and the consideration named is one dollar. It is true, the evidence shows that the real consideration was an old indebtedness due him from Hunt, but the amount, to say nothing of the value, was not much greater than the value of the land above the plaintiff's mortgage. It appears also, that at the time he took the conveyance he had full knowledge of the plaintiff's mortgage. It was talked of between him and Hunt, and the evidence tends to show that it was supposed at that time to be a valid mortgage. It appears to us that the understanding between him and Hunt was that he was purchasing and paying for a mere equity of redemption. If so, equity requires that as against him the land should stand charged with the payment of the mortgage debt without regard to any infirmity which may inhere in the mortgage, unless the mortgage was void as against public policy, and we hold that it was not.

In our opinion the decision of the court below—

Should be affirmed.

1. A mortgage executed by the homestead settler after final proof had been made but before the patent issued, was held valid in the following cases: *Watson* v. *Voorhees*, 14 Kansas, 328; *Cheney* v. *White*, 5 Neb., 261; and *Jones* v. *Yoakum*, 5 Neb., 265.

LOUIS JARVIS ET AL. *v.* GEORGE W. HOFFMAN ET AL.

Supreme Court of California.—April Term, 1872.—43 California, 314.

HOMESTEAD; PATENT.—Upon the death of a husband, who has taken up and entered a homestead, under the act of Congress of May 20th, 1862, if the five years have not expired for a patent to issue, the widow, upon performing the remaining conditions, is entitled to a patent, and acquires a title in fee, free from all trust in favor of the children, whether adults or minors.[1]

APPEAL from the District Court of the Sixth Judicial District, Yolo county.

The facts are stated in the opinion.

C. P. Sprague for appellants.

It is the theory of the common law that all property that is descendible is also devisable. (4 Kent, 511.) Is not the reverse of this proposition true? Is not all descendible property also devisable? If this proposition be true, the land in controversy could not descend to the heirs, from the fact that St. Louis, under the statute, could not have disposed of it by will, or otherwise. Our statute appears to sanction the common law rule, with the additional provision that all property devisable is subject to the payment of the debts of deceased persons. The land in dispute not being subject to St. Louis' debts, is neither devisable nor descendible. (Hittell, 7.326.)

A State homestead, under our statute, is neither common property, subject to distribution, nor the separate property of either husband or wife, but is a joint tenancy, with the right of survivorship, and vests absolutely in the survivor immediately upon the death of one of the parties. (Buchanan Estate, 8 Cal., 507.) This seems clearly to be the intent of the act of Congress of May 20th, 1862: the widow taking by right of survivorship, which is analogous to "irregular succession" in the civil law, defined to be "that which is established by law in favor of certain persons." (Bouvier's Law Dictionary.)

J. H. McKune for respondents.

The questions of law to be determined on this appeal are:

I. Did the plaintiff, Margaret, by the patent from the United States government, take the legal title in her own right, or as trustee for all the heirs of Colbert St. Louis, deceased?

II. Did Colbert St. Louis take the interest he held in said land by gift, within the meaning of section one of the act passed April 17th, 1850, defining the rights of husband and wife?

To the first point defendants cite: act of Congress May 20th, 1862, 2 Lester, 47; *Brenham* v. *Story*, 39 Cal., 179; *Grover* v. *Hawley*, 5 Cal., 485; *Soto* v. *Krader*, 19 Cal., 87; *Bond* v. *Swearingen*, 1 Hammond, 393; *Rea* v. *White*, 8 Hammond, 216; *Ancey* v. *Dufine*, 9 Hammond, 145.

To the second point they cite: act of Congress May 20th, 1862; *Scott* v. *Ward*, 13 Cal., 458; *Wilson* v. *Castro*, 31 Cal., 433; *Noe* v. *Card*, 14 Cal., 596; *Hood* v. *Hamilton*, 33 Cal., 703.

By the court, CROCKETT, J.:

In 1864 one Colbert St. Louis took up and entered as a homestead, under the act of Congress of May 20th, 1862, (Stats. 1862, p. 392), a quarter-section of the public land of the United States, in Yolo county, and immediately entered upon and continued to occupy and cultivate said tract as a homestead until his death, in 1866. When he entered upon the land as a homestead, he had a wife and several children, who resided with him on the tract until his death, after which the widow and children continued to occupy and reside upon it until the year 1867, when she intermarried with one Jarvis, and from thenceforth she and her husband, together with the children, have resided upon and occupied the land until the present time. At the time of his death, St. Louis left several children by a former marriage, all of whom have attained their majority, and also several children by his last marriage, who then were, and yet are minors.

At the expiration of five years from the time when the land was entered by St. Louis as a homestead, the widow, on making the proper proofs, obtained a patent in her own name from the United States, vesting in her the legal title to the premises.

This action is brought by the widow and her present husband, against the adult and minor children of her deceased husband, to quiet her title to the land, the fee of which she claims to hold in her own right, and for her own exclusive use, free from any trust for either the adult or minor children. On the other hand, the children, in their answers, claim that she holds the legal title partly, if not wholly, in trust for them, and they pray to have the trust declared, and for a partition according to their respective rights. The court below decided that the widow was entitled to eight twenty-fourths of the land, and that the children were entitled to the remainder, in certain proportions.

From this judgment the widow and her husband have appealed.

claiming that she is entitled to the whole. Section 2 of the homestead act provides "that no certificate shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his widow, or, in case of her death, his heir or devisee, or, in case of a widow making such entry, her heirs or devisee, in case of her death, shall prove, by credible witnesses, that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law. And provided, further, that in case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified."

These provisions leave no room for a reasonable doubt that, on the death of the husband, his widow, on performing the remaining conditions of occupation and payment, became entitled to the patent in her own name. The statute so expressly declares, and it is only in the event that there is no widow, or, if there be one, then, in the event of her death, that the patent shall go to the children. That this was the intention of Congress is made perfectly manifest by the provision that, in case of the death of both the father and mother, "the right and fee shall inure to the benefit of said infant child or children," and by the further provision that, at any time within two years after the death of the surviving parent, the land may be sold for the sole benefit of such minor children, and the purchaser will be entitled to a patent in his own name. But by the very terms of the act, even the

minor children, whose interests are so tenderly regarded, will not be entitled to the right and fee of the land, except in the event of the death of both their parents. The considerations which prompted these provisions doubtless were that, on the death of the father, the mother became the head of the family, and would be impelled, by her natural affection for her children, to use the property for their advantage as well as her own.

She was deemed to be the safest depository of the title, as she was the head of the family and the natural guardian of the children, charged with their support and maintenance. It was evidently the intention of Congress that, on the death of the father, the mother should be subrogated to all his rights in the land, and on performing the remaining conditions, should acquire and hold the title precisely as he would have held it if he had lived. But, if the father and mother should both die before the conditions were fully performed, leaving minor children, the right and fee of the land would immediately inure to their benefit, and might be sold for their use at any time within two years, without the performance of any further conditions, and the purchaser would immediately become entitled to the patent, on payment of the office fees, and such other sum of money as might then remain unpaid, to the government or its officers. But, if the father and mother should both die before the conditions were performed, leaving adult children or devisees, and no minor children, then such adult children or devisees, on performing the remaining conditions, would be entitled to the patent, and thus acquire a title in fee. But, when the widow performs the conditions and obtains the patent, the statute attaches to it no trust in favor of either the adult or minor children. As already stated, she takes the title as her deceased husband would have taken it had he lived. In confiding the title to her, Congress trusted to her natural affection for her children as the guaranty that she would use the land judiciously and for their mutual advantage. The law annexes no conditions or trusts to her title, and the courts have no power to do it. In my opinion, the patent vests the widow with an absolute title in fee to the land, and the defendants have no interest therein.

Judgment reversed, and cause remanded for a new trial.

1. And it makes no difference if she commutes under the 8th section of the act, she would still hold the land in her own right. *Perry* v. *Ashby*, 5 Neb., 291.

SILVER v. LADD.

December Term, 1868.—7 Wallace 219.

1. In construing a benevolent statute of the government, made for the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, the words "single *man*" and "married *man*" may, especially if aided by the context and other parts of the statute, be taken in a generic sense. *Held*, accordingly, that the fourth section of the act of Congress of 27th September, 1850, granting by way of donation lands in Oregon Territory to "*every* white *settler* or *occupant*, * * * American half-breed Indians included," embraced within the term single *man* an unmarried woman.
2. The fact that the labor of cultivating the land required by the act was not done by the manual labor of the settler is unimportant, if it was done by her servant or friends for her benefit and under her claim.
3. Residence in a house divided by a quarter-section line enables the occupant to claim either quarter in which he may have made the necessary cultivation.
4. In cases where relief is sought on the ground that the patent was issued to one person while the right was in another, the decree should not annul or set aside the patent, but should provide for transferring the title to the person equitably entitled to it.

ERROR to the Supreme Court of Oregon.

An act of Congress of 27th September, 1850, providing for the survey and for making donations to settlers of public lands in Oregon, commonly called the Donation Act, provides by a part (here quoted *verbatim*) of its fourth section as follows:

"There shall be, and hereby is, granted to *every white settler or occupant* of the pubic lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of *his* intention to become a citizen, or who shall make such declaration on or before the first day of December, 1851, now residing in said territory, or who shall become a resident on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land, if a single *man*, and if a married man the quantity of one section, or 640 acres: one-half to himself and the other half to his *wife*, to be held in her own right; and the surveyor general shall designate the part inuring to the husband and that to the wife, and enter the same on the records of his office."

The fifth section of the same act is thus:

"That to all white MALE citizens of the United States, or persons who

shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said territory between 1st December, 1850, and 1st December, 1853, and to all white MALE *American* citizens not hereinbefore provided for, becoming twenty-one years of age in said territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisons of this law, there shall be, and hereby is, granted the quantity of one quarter-section, or 160 acres of land, if a single *man*, or if married, or if he shall become married within one year from the time of arriving in said territory, or within one year after becoming twenty-one years of age as aforesaid, then the quantity of one-half section, or 320 acres; one-half to the *husband* and the other half to the *wife*, in her own right, to be designated by the surveyor general as aforesaid," &c.

With these provisions in force, Elizabeth Thomas, an aged widow, went with her son, an unmarried man, to Oregon Territory, and settled there. They lived in the same house. It stood upon the line dividing two parcels of land, the line running through the centre of the building. Cultivation was made on both tracts, one being claimed by the mother, the other by the son. On the 17th of May, 1861, the register and receiver of the proper land office issued a *donation certificate*, declaring Mrs. Thomas to have made the proof which entitled her to a patent for the tract which she claimed. The son received also a certificate for the adjoining tract, which he claimed. There was no dispute about that tract.

Mrs. Thomas had been a widow for more than twenty years when the settlement was made under which she received the certificate. The certificate granted to Mrs. Thomas was subsequently, June 25, 1862, set aside by the Commissioner of the Land Office, on the ground that she was *not the head of a family*. On appeal to the Secretary of the Interior the action of the commissioner was affirmed, on the ground that she was *not a settler on the land*. In January, 1865 (Mrs. Thomas being now dead and the land in possession of one Silver, legal representatives of her son and only heir, Fenice Caruthers, who died soon after her), the United States sold the land and granted a patent for part of it to one Ladd, and for the residue to a certain Knott. These brought ejectment against Silver in the Circuit Court of the United States upon the patent. Silver thereupon filed a bill in one of the courts of Oregon against them, setting forth the title of Mrs. Thomas, of her son, and of himself, representing that the patents were

clouds on the true title, and praying an injunction against the suit at law. The prayer asked further:

"That the said patents may each be declared to be fraudulent, and as being procured by misrepresentation and fraud, and in favor of the rights of plaintiff, and that they be, and each of them, declared *canceled and set aside*, and declared fraudulent and *void*, and that the claims of said defendants, and each of them, be adjudged fraudulent and *void*, and without authority of law, and that the title of the said premises be adjudged to be in the estate of Fenice Caruthers, deceased, and that the same be quieted, and that the possession thereof be decreed to the plaintiff."

The court in which the bill was filed dismissed it; and on appeal to the Supreme Court of Oregon the decree was affirmed; that court holding that the donation certificate was void, because Mrs. Thomas, having been an unmarried *female*, was not such a person as could take lands under the Donation Act. The question here now was the correctness of the affirmance.

Mr. *J. S. Smith* for the plaintiff in error.

The grounds taken by the Commissioner of the Land Office and by the Secretary of the Interior seem to be without force. We reply to the argument of the Supreme Court of Oregon.

The word man is to be read in a generic sense, and as meaning person. There is probably not an essay or work of any considerable length published in the English language, alluding to the human race that does not employ the word constantly in this way. The words "he" and "man" are used also frequently in acts of Congress to denote both males and females, especially in many prohibitory and penal sections. So, the naturalization laws—like this act a voluntary concession of favors—use the words "he," "him," and "man" constantly to denote and include both men and women. The expression "single man," in this act points to the quantity of land rather than the classification of persons. *Mick* v. *Mick*, 10 Wendell, 379; *Sutliff* v. *Forgey*, 1 Cowan, 97.

The qualifiations mentioned in section 4 are repeated in section 5, with the addition of the word "male," and with a further limitation of persons, by leaving out "American half-breed Indians." The age limit is also changed from 18 to 21 years. It is difficult to avoid the conclusion that the difference in phraseology of the two sections was intentional, and the word "male" was inserted in section 5 and omitted in section 4 for a purpose. To make a word which in common use has both a generic and specific mean-

ing, assume its specific meaning when such meaning is not favored by its position in the context, and is repugnant to the manner in which the legislature have employed other words, would make Congress guilty of discriminating in language without a difference in meaning, and is opposed to the general spirit of the act. Everywhere, through all is parts, the act shows a liberal design and disposition towards making provision for women.

If our view is right, the patent must be canceled as void. An idea seems to obtain that there is some magic about a patent of the United States which precludes investigation of its validity. But from the beginning, our State courts have entertained a bill to avoid a patent in favor of previously acquired rights, upon precisely the same principles that it would lie to avoid the deed of a private individual, and the United States Supreme Court has taken the same course without exception. The only debatable ground has been to what extent and upon what grounds a patent can be attacked in a court of law.

Messrs. *Ashton*, *Caffey*, and *Lander*, *contra*.

1. If the word "man," as used in section 4, is a generic term, and includes woman as well as man, then it must be a generic term when qualified in the same sentence by the adjective *single*, as well as when qualified by the adjective *married*. It cannot have two meanings in the same act, the same section, the same sentence. If by the word man, man alone is meant, the section and sentence have force and meaning; if both are included, the meaning of the clause is destroyed. It would read thus:

"There shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, &c. If a single man (or woman), and if a married man (or woman), or if he (or she) shall become married within one year from the 1st of December, 1850, the quantity of one section, or six hundred and forty acres, one-half to himself (or herself), and the other half to his *wife*, to be held by her in her own right."

This reading is absurd on is face.

2. The state of the Territory of Oregon at the time this law was passed, and the condition of its laws with reference to land, forbid the construction set up by the appellant. Oregon, by treaty, was open to the joint occupation of the subjects of Great Britian and the United States. Under the treaties, citizens of the United States, as is well known, have braved the dangers and endured the privations of an overland journey across the continent, and

settled among tribes of Indians which were both hostile and treacherous. Without government or protection, they created a provisional government, and enacted a land law suitable to their wants, and proper to the condition of the country, where a man had to defend as well as to labor upon the land which he claimed and allotted to himself. Under such circumstances, the words "any person," in the provisional land law, could hardly be intended to include a single woman. This court, in *Stark* v. *Starr*, 6 Wallace, 415, goes far to sustain the doctrine that Congress had this land law in view when they passed the act of 27th of September, 1850. The construction put upon the act by the Supreme Court of Oregon, whose judgment it is now sought to reverse, is, in effect, an interpretation of a State law by the courts of the State itself.

3. Confessedly, Mrs. Thomas was an old woman when she went to Oregon—how old, don't clearly appear, but certainly aged, she could not have made the cultivation required. In fact, she lived in her son's house; he made the settlement, if any was made, but confessedly *it* was not on this tract. He, not she, was the head of a family. The objections of the commissioner and secretary are, therefore, not without force, though less conclusive than those of the Supreme Court of Oregon.

MR. JUSTICE MILLER delivered the opinion of the court.

The donation certificate granted to Elizabeth Thomas was set aside by the Commissioner of the Land Office, June 25, 1862, on the ground that Elizabeth Thomas was not the head of a family. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that she was not a settler on the land. The Supreme Court of Oregon, whose judgment we are now to review, held the certificate void, because she was not such a person as could take lands under the act, being an unmarried female.

If, for any of these reasons, the action of the commissioner can be sustained, then the judgment of the Supreme Court of Oregon, dismissing plaintiff's bill, must be affirmed. If it cannot, then the patents issued to defendants after the certificate of Elizabeth Thomas was wrongfully set aside, must inure to the benefit of plaintiff, representing her equitable title. (*Lindsey* v. *Hawes*, 2 Black, 554; *Garland* v. *Wynn*, 20 Howard, 8; *Minnesota* v. *Bachelder*, 1 Wallace, 109.)

It is upon the application of the facts of this case to part of section four of the act of 1850, that the questions of construction already mentioned arise.

As there is nothing in this act which requires the settler to be the head of a family, that question may be dismissed without further consideration.

In reference to the question of actual settlement and residence on the land, we have only to refer to the case of *Lindsey* v. *Hawes* (2 Black, 554), where this precise question is raised, and where it is said that a person residing in a house which is bisected by the line dividing two quarter-sections, will be held to reside on both, and, consequently, on either of them to which he may assert a claim. Nor is any importance to be attached to the fact that Mrs. Thomas was old and incapable of the manual labor necessary to cultivating ground. If it was done for her by hired servants, or by her son, without compensation, it is equally available to her.

In reference to this question, and to the one next to be considered, namely, the right of unmarried women to the benefits of this statute, we may apply, with added force, the language used in *Lindsey* v. *Hawes*, that it concerns a construction of one of the most benevolent statutes of the government, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. In addition to this, it may be said that the section of this statute which we are now considering, was passed for the purpose of rewarding, in a liberal manner, a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement. These circumstances, and the policy of this act, are fully stated in the case of *Stark* v. *Starr* (6 Wallace, 402), decided at our last term.

Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of Congress.

With these views, we approach the last and most difficult question in the case, namely, whether Mrs. Thomas is excluded from the benefit of this act because she was an unmarried woman?

The affirmation of this proposition is based upon that clause of the fourth section, which, in prescribing the quantity of land

to be given to each actual settler, says it shall be "one-half section, or three hundred and twenty acres, if a single man, and if a married man," six hundred and forty acres. We admit the philological criticism that the words "single man" and "married man," referring to the conjugal relation of the sexes, do not ordinarily include females. And no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded.

But, conceding to it all the force it may justly claim, we are of opinion that it does not give the true meaning of the act according to the intent of its framers, for the following reasons:

1. The language of the statute is, that there is hereby granted to "every white settler or occupant of the public lands, above the age of eighteen years," &c. This is intended to be the description of the class of persons who may take, and if not otherwise restricted, will clearly include all women of that age, as well as men.

2. It is only in prescribing the quantity of land to be taken, that the restrictive words are used, and even then, the words used are capable of being construed generically, so as to include both sexes. In the case of a married man, it is clear that it does include his wife.

3. The evident intention to give to women as well as men, is shown by the provision, that, of the six hundred and forty acres granted to married men, one-half shall go their wives, and be set apart to them by the surveyor general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protection of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

4. But, a comparison of the manifest purpose of Congress, and the language used by it in section four of this statute, with those of section five, will afford grounds for rejecting the interpretation claimed by defendants, which are almost conclusive.

The first of these sections applies, as we have already said, to that meritorious class who were then residing in the territory, or should become residents by the first of December thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and gives to each a half-section of land.

The fifth section makes a donation of half this amount and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words "white *male* citizens of the United States." Now, when we reflect on the class of persons intended to be rewarded in the fourth section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more restrictive, in reference to quantity of land, to age of donee, citizenship, &c., they use apt words to express this restriction, and then use the words "white males" in reference to sex, we are forced to the conclusion that they did not intend, in section four, the same limitation in regard to sex, which they so clearly expressed in section five. The contrast in the language used in regard to the sex of the donees in the two sections, is sustained throughout by the other contrasts in age and character of the donees, and in quantity of land granted.

The certificate of Mrs. Thomas was, therefore, properly issued by the register and receiver, and conferred upon her the equitable right to the land in controversy, and the decree of the Supreme Court of Oregon must be reversed.

But the language of the prayer of this bill for relief, and some remarks in the brief of counsel, call for comment on the proper decree to be rendered on the return of the case to that court.

The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title, which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways. (*Jackson* v. *Lawton*, 10 Johnson, 24; *Boggs* v. *Mining Company*, 14 California, 363-4.)

The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs.

The prayer for general relief in the bill in this case is sufficient to justify any or all these modes of relief, and the case is—

Remanded to the Supreme Court of Oregon for that purpose.

DAVENPORT *v.* LAMB ET AL.

December Term, 1871.—13 Wallace, 418.

1. The act of Congress of 1836 authorizing the issue of patents for land in the name of deceased parties, who in their lifetime became entitled to such patents, applies to patents under the act of Congress of September 27th, 1850, called the Donation Act of Oregon; and such patents enure to the parties designated in the Donation Act, and not soley to the parties designated in the act of 1836.
2. The Donation Act declared that in case husband or wife should die before a patent issues, the survivor and children, or heirs, should be entitled to the share or interest of the deceased in equal proportions, except where the deceased should otherwise dispose of the property by will; *held* that each of the children, and the surviving husband or wife, took equal shares, and that the property of the deceased was not to be divided so as to give one-half to the surviving husband or wife, and the other half to the children or heirs of the deceased.
3. A covenant to "warrant and defend" property for which a quit-claim deed is executed "against all claims, the United States excepted," only applies to claims from other sources than the United States. It does not cover any interest of the United States, nor preclude its acquisition by the convenantors or their heirs for themselves.
4. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general wrranty" only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.

APPEAL from the Circuit Court for the District of Oregon.

Emma Lamb and Ida Squires, asserting themselves as granddaughters of one Daniel Lownsdale, to own each an undivided one-tenth of "the south half of Block G" in Portland, Oregon, filed a bill against their co-heirs and persons claiming under them for a partition; one Davenport, who set up a title adverse to them all, being made a party defendant, and the real matter in issue being the validity of the title set up by him.

This case was thus:

On the 25th of June, 1850, Daniel Lownsdale, Stephen Coffin, and W. W. Chapman, were the owners of a land claim, embracing a portion of the tract upon which the city of Portland is situated. The legal title to the property was then in the United States, but the parties, asserting their claim to the possession under the law of the provisional government of the territory, expected that legislation would be taken at an early day by Congress for the transfer of the title to them, or some one of them. This expectation of legislation on their behalf was common with all occupants of land in Oregon, whose rights were merely possessory, the fee of the entire land in the territory being in the United States. With this expectation these claimants, on the day named, executed a deed to Chapman, one of their own number, of numerous lots and blocks in Portland, into which a portion of their claim had been divided, including among them the already mentioned south half of block G, the subject of the bill. The deed purported for the consideration of $60,000, to "release, confirm, and quit-claim" to Chapman, his heirs and assigns, the described property; and contained two covenants on the part of the grantors—one, to warrant and defend the property to their grantee, his heirs and assigns "*against all claims except the United States;*" and the other "*that if they obtain the fee-simple to said property, from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" The interest thus acquired by Chapman in the south half of block G, was afterwards assigned by various mesne conveyances to the defendant, Davenport.

At the time this deed was executed Lownsdale was a widower having three children, named James, Mary, and Sarah (mother of the two persons complainants in the bill.) At the same time there lived in the same town a widow named Nancy Gillihan, having two children, called William and Isabella. In July, 1850, the

widower and the widow intermarried, and they had, as the issue of this marriage, two children, named Millard and Ruth.

On the 27th of September, 1850, Congress passed the act, which is generally known in Oregon as the Donation Act, and under which the title to a large portion of the real property of the State is held. It is entitled "An act to create the office of surveyor general of the public lands of Oregon, and to provide for the survey and to make donations to the settlers of the said public lands." (9 Stat. at Large, 496.)

By the fourth section of this act a grant of land was made to every white settler, or occupant of the public lands in Oregon, above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the territory, or might become a resident on or before the 1st of December, 1850, and who should reside upon and cultivate the land for four consecutive years, and otherwise conform to the provisions of the act. The grant was of 320 acres of land, if the settler or occupant was a single man, but if a married man, or if he should become married within a year from the 1st of December, 1850, *then the grant was of* 640 *acres, one-half to himself and the other half to his wife, to be held by her in her own right.*

By the same section the surveyor general was *required to designate of the land thus granted the part enuring to the husband and the part enuring to the wife, and to enter the same on the records of his office;* and it was provided that in all cases where such married persons complied with the provisions of the act so as to entitle them to the grant, whether under the previous provisional government or afterwards, *and either should die before the issue of a patent, "the survivor and children, or heirs, of the deceased, shall be entitled to the share or interest of the deceased in equal proportions,"* except when the deceased should otherwise dipose of the same by will.

Under this act Lownsdale was a donation claimant, and dated the commencement of his settlement on the 22d of September, 1848. This settlement became complete on the 22d of September, 1852, at the expiration of the four years prescribed. The proof of the commencement of the settlement and of the continued residence and cultivation required by the act was regularly made; and of the land the east half was assigned to Lownsdale and the west half to his wife Nancy. Within the portion thus assigned

to the wife the premises in controversy were included. The tract thus claimed and settled upon embraced a fraction over 178 acres, and for it, in October, 1860, a patent certificate was given to Lownsdale and his wife; and in June, 1865, a patent of the United States was issued to them, giving and granting in terms to Daniel Lownsdale the east half of the property, and to his wife, Nancy Lownsdale, the west half.

Nancy died in April, 1854, before the issue of the patent, leaving the four children already mentioned—two, William and Isabella Gillihan, by her first husband, and two, Millard and Ruth Lownsdale, by her second. These four children and her surviving husband Daniel became entitled to her interest in the tract set apart to her; though in what shares the husband took as respected the children, whether one-half or only one-fifth, was one of the questions in the case.

In January, 1860, Daniel purchased the interest of Isabella Gillihan. He himself died in May, 1862, intestate, leaving as his heirs the four children already named—that is to say, James and Mary, by his first wife, and Millard and Ruth by his second wife; and also two children (the complainants in this case) of his deceased daughter Sarah, by his first wife. The four children living, each inherited one undivided fifth of their father's estate, and the two children of the deceased daughter, each one undivided tenth.

In 1864, William Gillihan, one of the children of Nancy, brought suit in one of the courts of the State of Oregon for partition of the tract set apart to Nancy as above mentioned—called the Nancy Lownsdale tract—making defendants the heirs of both Daniel and Nancy, and numerous other persons purchasers and claimants under Daniel. By the decree in that case it was among other things adjudged that Daniel was the owner of an undivided two-fifths of the entire Nancy Lownsdale tract, and that the said William Gillihan and Ruth and Millard Lownsdale, as heirs of Nancy Lownsdale, deceased, were each entitled to an undivided one-fifth of the whole of said tract, and certain portions of said tract were decreed and set apart to the said William, Ruth, and Millard, to be held by them in severalty, and the residue of said tract was set apart and allotted to the heirs, vendees, or claimants under Daniel, according to their respective interests, without, however, determining the extent of the respective rights and interests of the heirs and vendees or claimants between themselves; and by reason of the said partition not being equal, owelty was allowed

to William, Millard, and Ruth. The portion set apart to the heirs, and vendees or claimants, under Daniel, included the south half of block G, the premises in controversy.

Two granddaughters of Lownsdale, through his daughter Sarah, now deceased, assumed accordingly that through their mother, this Sarah, they owned, together, her undivided one-fifth of the south half of the block G; each of them, of course, an undivided one-tenth.

Davenport denied such their ownership, asserting that he himself owned the whole of the south half of the block; or, if not the whole, then five-eighths; and, if not five-eighths, then one-half; either one of which latter interests in himself being inconsistent, like the first, with that of one-fifth in the said two granddaughters.

I. Davenport founded his ownership apparently of the *whole* of the south half in part on the first of the covenants (quoted *supra*), in the deed of June 25th, 1850, to Chapman, through whom he claimed; and as much or more on a matter alleged by him, to wit, that in 1860 Lownsdale offered to sell him a portion of another block in Portland (block 75), and that he, Davenport, knowing that a difficulty was likely to occur about that and other property, submitted to Lownsdale a list of all the property he believed he then rightly held, and among the rest the south half of block G, and pointed out such as he thought the title of might be defective through him, and that Lowndsdale agreed verbally for $2,000, to give a confirmatory title to all the property thus submitted to him, "that HE thought might require it." Davenport accordingly paid the $2,000, and Lownsdale gave to him a deed for half of block 75, and also a confirmatory deed for certain other lots, but not for the south half of block G: that lot not being included among those described in the confirmatory deed, and a lot therefore to which Lownsdale, as Davenport considered, was to be held to have declared that he had no title in himself.

II. But if this was not all so, and if what was thus alleged in the nature of an estoppel *in pais* did not exist or operate, Davenport conceived that still he had five-eighths of the property; for that (explaining), he had got—

First. Four-eighths, the *true* share (as he asserted) of Daniel as survivor of his wife, inasmuch as under the statute which gave the wife's property to her surviving husband and her children "in *equal* proportions." Daniel had got one-half or four-eighths, an equal share with the children, and not one-fifth, the same share as

if he were but one of five children, regarded as a class; and that this one-half passed under the second of the two covenants of the deed of June 25th, 1850.

Second. One-eighth—the eighth, to wit, that came from Isabella Gillihan; for, that this had been truly and literally "obtained" by Daniel "from the government of the United States," though indirectly, and came under the covenant; the fact, as he assumed, that it came through Isabella, and not directly, not affecting Lownsdale's obligation or that of his heirs to convey.

III. The final and least favorable to himself of Davenport's positions was, that if this second fraction of title—the one-eighth, Isabella's share—did not pass, still that he, Davenport, had one-half; the share of Daniel as got by survivorship, and under the statute, as already stated, from his deceased wife Nancy.

In this state of claim respectively it was that the bill in this case was filed; the complainants setting up a claim for their one-fifth, and Davenport setting up his title; the matter already mentioned as alleged by way of estoppel *in pais*, though set out and well colored in his answer to the bill, not being proved by writing or in some essential features otherwise than by his own testimony.

The court below held that Daniel Lownsdale became the owner in fee of two-fifths (undivided) of the west half of the Lownsdale donation claim (being the part allotted to Nancy), including the south half of block G; one-fifth by donation from the United States upon the death of his wife Nancy, before the issue of the patent, and the other one-fifth by purchase from Isabella Gillihan; and that the title to the one-fifth of the south half of block G acquired from the United States enured to Davenport, by virtue of the covenant in the deed of June 25th, 1850, to Chapman, Davenport deriving his interest under Chapman; and that the remaining four-fifths in the south half of that block were owned by the four children of Lownsdale living, and the two children of his deceased daughter Sarah; and the court decreed a partition accordingly.

From this decree Davenport alone appealed to this court.

Mr. W. W. Chapman for the appellant.

1. The decree is erroneous, in not giving to Davenport the whole of the property in controversy, instead of one-fifth of it.

2. If not thus erroneous, it is erroneous in not giving five-eighths.

3. And if not erroneous in either respect, it is erroneous in not giving to him one-half instead of one-fifth.

1. *Davenport is entitled to the whole property.* In making the decree below the first clause in the covenant is unnoticed, and the second (including the release obtained from Isabella) is held to operate only upon the same proportional interest in the block which Lownsdale obtained in the tract of 178 acres as survivor of his wife—determined by the court to be only one-fifth of it—notwithstanding the original decree in partition had allotted to the vendees and heirs of Lownsdale the entire block.

The first covenant protects the covenantee and assigns, in the possession against Lownsdale and all other persons, and against any title engrafted upon it through his instrumentality. He filed his notification, including it, and dating his settlement and residence from the 22d September, 1848, to and including the date of the covenant. This appropriated the possession and the block to his own use, against which he had covenanted to warrant and defend. He was not obliged to do this. He could as easily have omitted it as have embraced it, and he knew when he did so that his wife would thereby become entitled to an interest in her *own right*, and deprive the covenantee of the possession and title, unless by the happening of a contingency provided for by the law (then unlikely to occur), by which the title and possession might revest in him. In the face of this covenant he took this risk. In consequence of the peculiar form of the covenant, the covenantee might not have been able to maintain an action at law, and because the subject was, for the time, supposed to be out of reach of the arm of a court of equity. But the contingency did happen. The same possession, with a title engrafted upon it, through his instrumentality, revested in him, and it is now within the reach of a court of equity, perfect and complete, as contemplated by the parties in the formation of the second covenant, and therefore his warranty should estop him and his heirs from asserting a right to the possession thus ripened into a title through his act.

In addition to this, the agreement between Davenport and Lownsdale operated as an estoppel *in pais*. The south one-half of block G was not put in the confirmatory deed only because Lownsdale declared he had no title to it. Having received the $2,000 for confirming to Davenport all that he did claim, his descendants ought not now to be allowed to gainsay his declaration.

2. *If not entitled to all, Davenport is entitled to five-eighths.* The donation act gives the property to the husband, as one party, and to the children as the other, in equal proportions. Each thus takes one-half. This seems a more natural construction than to reduce the husband to the grade of a child. If this is so, Davenport has certainly one-half, equal to four-eighths.

But he has another fifth through Isabella under the second covenant.

Mr. G. H. Williams contra:

Argued that the covenants to Chapman were joint and not several, and that being in a deed where he was himself grantor were void; that the heirs of Lownsdale were not named in it, and that it did not bind them; that the covenantors had not obtained the fee from the United States; but that it was granted to the heirs of Nancy Lownsdale, and that if the husband's share as survivor of his wife was within the covenant, the shares of the children assuredly were not; that these shares under the Oregon statute were four-fifths: the husband being only entitled to an equal proportion, or one fifth, with them.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows9

Neither of the patentees were living at the time the patent for the donation claim in this case was issued, Lownsdale having died in May, 1862, and Nancy having died in April, 1854. At common law, the patent would have been inoperative and void from this circumstance. (*Galt* v. *Galloway*, 4 Peters, 345; *McDonald* v. *Smalley*, 6 *Id.*, 261; *Galloway* v. *Finley*, 12 *Id.*, 298; *McCracken's Heirs* v. *Beall and Bowman*, 3 A. K. Marshall, 210; *Thomas* v. *Wyatt*, 25 Missouri, 26.) By that law, the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person; and the rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20th, 1836 (5 Stat. at Large, 31), which obviates this result. That act declares: "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall enure to and become vested in the heirs, devisees and assigns of such deceased

during life." This act makes the title enure in a manner different from that provided by the Donation Act upon the death of either owner before the issue of the patent, for we do not understand that the survivor of the deceased husband or wife was, at the time, his or her heir by any law of Oregon. If the act of 1836 can be considered as applying to patents issued under the Donation Act, where the party originally entitled to the patent has died before the patent issues—and on this point no question is made by either party—then its language must be construed in connection with, and be limited by, the provisions of the Donation Act, giving the property of a deceased husband or wife to the survivor and children, or heirs of the deceased, unless otherpatentee, as if the patent had issued to the deceased person wise disposed of by will; and in that case the patent here must be held to enure in favor of these parties instead of the heirs solely.

The four children of Nancy Lownsdale, the two by her first husband, Gillihan, and the two by her last husband, survived her, and these, with her surviving husband, became entitled, on her death, to her property, in equal proportions, she having died intestate. This is, indeed, the express language of the statute, and in consequence, each of the five persons named took an undivided fifth interest in the property. The learned counsel of the appellant, however, contends that the statute should be construed as dividing the property equally between the survivor on the one part, and the children or heirs upon the other. But the construction we give is the more natural one, and is in accordance with the uniform ruling of the courts, State and Federal, in Oregon.

In January, 1860, Lownsdale purchased the interest in this property of Isabella Gillihan (then Isabella Potter, she having intermarried with William Potter), and thus became owner of two undivided fifths. On his death, these two undivided fifths passed to his heirs, he having died intestate, unless they were controlled by his covenant in the deed to Chapman.

In 1864 a suit was brought in a circuit court of the State of Oregon, by one of the children of Nancy by her first husband, for partition of the property which was assigned to her of the donation claim—the Nancy Lownsdale tract, as it is termed. In that suit the heirs of both Daniel and Nancy, and numerous other persons, purchasers and occupants under Daniel, and the appellant, Davenport, were made parties. The suit resulted in a decree

setting off, so far as practicable, the two undivided interests of Daniel to his heirs and vendees, in lots and blocks as they were claimed, without any determination, however, of the extent of the respective rights and interests of these heirs and vendees, between themselves; and in setting apart the remaining undivided three-fifths in severalty to the children of Nancy, who had retained their interests, owelty being allowed and paid for the inequalities existing in the partition. The tract set apart for the two-fifths of Lownsdale, included the premises in controversy. The heirs of Lownsdale were his two children living, by his first wife, two children of a deceased daughter by his first wife, named Emma S. Lamb and Ida Squires, and his two children by his second wife. Against these heirs, the only claimant of the premises in controversy was the appellant, Davenport, who derived his interest by various mesne conveyances from Chapman.

The present suit is brought by the children of the deceased daughter of Lownsdale by his first wife, they having inherited her interest.

For its determination it is necessary to consider the effect upon the interest claimed by Davenport of the covenants contained in the deed of Lownsdale, Coffin, and Chapman, executed to Chapman on the 25th of June, 1850.

So far as that instrument purports to be a conveyance from Chapman to himself, it is of course ineffectual for any purpose. Its execution by him left his interest precisely as it existed previously. But this superfluous insertion of his name in the deed as a grantor, does not impair the efficacy of the instrument as a conveyance to him from Lownsdale and Coffin, nor their covenants with him and his heirs and assigns. These covenants must be treated as the joint contracts of the two actual grantors.

Whether these covenants bind the heirs of the covenantors, they not being named, may perhaps admit of question. Rawle on Covenants of Title, 579; *Lloyd* v. *Thursby*, 9 Modern, 463; *Morse* v. *Aldrich*, 24 Pickering, 450. The court below held that to the extent that the covenants affected the land, the heirs were bound by them, and as they have not appealed from this decision, it is unnecessary for the disposition of the case that the question should be determined by us.

What, then, is the effect and operation of the covenants? The first covenant, as already stated, is "*to warrant and defend*" the property released to Chapman, his heirs and assigns "*against all*

claims, the United States excepted." At the time this covenant was executed the title to the property was in the United States, and this fact was well known to the parties. Land was then occupied by settlers throughout the Territory of Oregon, under laws of the provisional government, which were generally respected and enforced. These laws could of course only confer a possessory right, and no one pretended to acquire any greater interest under them. It was against the assertion of claims from this source and any other source, except the United States, the owner of the fee, that the covenant in question was directed. By it the grantors were precluded from asserting any interest in the premises against the grantee and his heirs and assigns, unless such interest were acquired from the United States. The warranty does not cover that interest, and did not preclude its acquisition by the covenantors or either of them, or by their heirs, or its enjoyment by them or either of them when acquired.

The second covenant is that if the grantors "*obtain the fee simple*" to the property "*from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" This covenant is special and limited. It takes effect only in case the grantors, or their heirs (if the covenant binds the heirs), acquire the title directly from the United States; it does not cover the acquisition of the title of the United States from any intermediate party, and this was evidently the intention of the parties. They expected to obtain by the legislation of Congress the title of the United States to lands in their possession, and in case their expectations in this respect were realized, they contracted to convey the same to their grantee, or to his heirs or assigns. They could not have intended, in case their expectations were disappointed, and the title passed from the United States to other parties, to render it impossible for them to acquire that title in all future time from those parties without being under obligation to instantly transfer it to the grantee or his successors in interest. *Comstock* v. *Smith*, 13 Pickering, 116. And such would be the effect of their covenant if it were given an operation beyond the precise limitation specified.

As already stated, Lownsdale took under the Donation Act, as the survivor of his deceased wife, one undivided fifth interest in her property, and he subsequently purchased a similar interest from Isabella Gillihan, a daughter of his wife by her first husband. The interest which thus purchased is not covered by the cove-

covenant. He did not acquire it directly from the United States. Whether the interest which he received as survivor of his deceased wife, Nancy Lownsdale, is within the covenant, depends upon the question whether he took that interest by descent, as heir of Nancy, or directly as donee from the United States. The court below held that he took as donee, and not as heir, and that in consequence the interest was within the operation of the covenant, and Davenport, his assignee, was entitled to have such interest transferred to him, and that interest was accordingly set apart in severalty to him.

Whether this ruling is correct it is unnecessary for us to determine. The appellant does not of course controvert it, and the heirs of Lownsdale, who alone could in this case question its correctness, have not appealed from the decree of the court below.

The parol evidence offered of an alleged contract, in 1860, on the part of Lownsdale with Davenpart, to confirm the title of the latter to the whole of block G, and of Lownsdale's declarations at that time as to the title, is entirely insufficient to create any estoppel *in pais* against the assertion of the interest claimed by his heirs to portions of that property. The alleged contract of Lownsdale was simply to confirm the title of Davenport to all lands to which he, Lownsdale, deemed the title doubtful; and the ground of complaint appears to be that he did not consider the title of Davenport to block G as doubtful, and so declared, and therefore did not include that block in the property covered by his confirmatory deed. The declarations are at best but the expression of his opinion in relation to a subject upon which Davenport was equally well informed, or possessed equally with him the means of information. If the evidence of such declarations could be received years after the death of the party who is alleged to have made them, to control the legal title which has descended to his heirs, a new source of insecurity in the tenure of property would be created, and heirs would often hold their possessions upon the uncertain testimony of interested parties, which it would be difficult and sometimes impossible to meet or explain after an interval of years, instead of holding them upon the sure foundations of the records of the country. *Biddle Boggs* v. *The Merced Mining Co.*, 14 California, 367.

The decree of the court below must be *Affirmed.*

NOTE.—The act of May 20, 1836, vitalized the patent only from the date of the act. It did not make the patent valid from its date. *Wood* v. *Fer-*

guson, 7 Ohio St. 288. For other cases under the act see *Sullivant* v. *Weaver*, 10 Ohio, 275; *Tremble* v. *Boothby*, 14 Ohio, 109.

Under the act of August 8, 1846, granting land to the State to aid in the improvement of the Des Moines river, the Secretary of the Interior construed the grant to embrace lands north of the Raccoon Fork, and certified such lands to the State, and they were sold by the State.

In 1859, the United States Supreme Court decided that such lands were not embraced in the grant. By act of May 2, 1861, and July 12, 1862, Congress confirmed the title of the purchasers from the State. *Held*, that the confirmation related back to the day of sale by the State, and that the lands were subject to taxation from that time. *Stryker* v. *Polk Co.*, 22 Iowa, 131; *Litchfield* v. *Hamilton Co.*, 40 Iowa, 66.

LAMB *v.* DAVENPORT.

October Term, 1873.—18 Wallace, 307.

1. Unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title.
2. The proviso of the Oregon Donation Act of September 27th, 1850, which forbade the future sale of the settler's interest until a patent should issue, so far from invalidating contracts for sale made before its passage, raises a strong implication in favor of their validity.
3. Whether the husband or wife who takes as survivor the share of the deceased under the said Donation Act, takes as purchaser or by inheritance; held, that contracts of the husband concerning the equitable interest of the part allotted to him, made before the act was passed, are binding on the title which comes to his children by reason of a patent issued after the death of both husband and wife.

APPEAL from the Circuit Court for the District of Oregon; the case being this:

Prior to March 30th, 1849, one Lownsdale was in control of what was then known in Oregon Territory as "a land claim," that is to say, he was in possession, claiming it as owner, of a tract of land. The tract contained 640 acres. Thinking it a good site for a town, he laid it out in blocks and lots, which he offered for sale. Several lots were sold: a town grew upon them, and the city of Portland now stands upon the "claim."

At the date named the fee of the whole territory was in the

United States; and, of course, Lownsdale had no patent, nor indeed any warrant, survey, or title of any kind from the government. Nevertheless such "claims" were recognized by the immigrants, to a greater or less degree among themselves. The holders of claims sold then in whole or divided; agreeing to get a patent; and the hope and expectation of all parties was that the government, in time, would acknowledge the validity of what had been done.

On the 30th of March, Lownsdale transferred his claim to one Coffin, excepting from the transfer the blocks and lots which he had already sold. Coffin agreed to endeavor to obtain title to the whole 640 acres from the United States; and both parties agreed that they would contribute equally to all expenses, and divide equally the proceeds of sales of lots, &c., so long as the agreement should remain in force, and that when it should be dissolved by consent Coffin should convey Lownsdale one-half the land remaining unsold.

In November, 1849, Coffin sold to one Fowler two lots, which were numbered Nos. 5 and 6, in block 13, and Fowler sold them in January, 1854, to one Davenport.

On the 13th of December, 1849, Lownsdale and Coffin entered into an agreement with one Chapman, by which, describing themselves as join owners of the claim, they sold to him an undivided third part of it, the town lots and improvements: it being agreed that the three contracting parties should be equal partners in said property, except as to town lots already sold, and should take steps to obtain title from the United States. They were each to enter upon the business of selling the lots and account to each other for the proceeds.

On the 27th of September, 1850, Congress passed what is called "The Oregon Donation Act." (9 Stats. at Large, 496.) By its fourth section the act gave, on certain terms, to every actual settler (if a single man) a certain amount of land, 320 acres; and if a married one, twice the amount; in this latter case "one-half to himself and the other half to his wife, to be held by her in her own right." The act went on to say:

"And in all cases where * * * * * either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament."

It contained also a proviso, thus:

"Provided, that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void."

In this state of things on the 10th of March, 1852, and after the passage of the act, the said three partners, by deed, reciting therein that in order to obtain title from the United States it was necessary that each should designate the precise and particular portion of said land claim which each, by agreement with the other, claimed, in order that he might obtain a patent, as a preliminary measure, entered into certain covenants with each other under seal. It was recited that they had sold lots to each other and to third persons, obliging themselves to make to the grantees deeds of general warranty, wherein the grantor should obtain a patent from the United States, and the said three parties mutually covenanted that each would fulfil all contracts he had made with each other or with other persons, and also that when a patent should be obtained he would make good deeds for all lots patented to him which had been sold by the said parties jointly or any of them separately, such deeds to be made to the original grantee or his assigns. They also covenanted to endeavor to obtain title from the United States, and not to abandon their claim, &c.

On the next day, 11th March, 1852, Lownsdale made before the surveyor general, under the Donation Act, his designation of the part of the land claimed by him.

In January, 1857, Coffin (already mentioned as the person to whom Lownsdale, in March, 1849, transferred his claim) sold two other lots, in block 13, Nos. 2 and 7, to a purchaser who soon afterwards sold them to Davenport, who had bought, as we have said, Nos. 5 and 6 in the same block.

Lownsdale was a married man. Accordingly, under the Donation Act, Mrs. Lownsdale was entitled to 320 acres, and Lownsdale himself to a like amount. Mrs. Lownsdale's half was set aside. It did not include the four lots sold by Coffin; but Lownsdale's half did.

On the 17th day of October, 1860, a patent certificate issued to Lownsdale. He died May 4th, 1862, his wife having died not long before him, leaving him and four children surviving. By the laws of Oregon, in such a case, the wife's estate is directed to be divided between the husband and children "in equal propor-

tions;" though whether this meant, in this case, that the husband should have one-half or one-fifth was not so clear.

On the 6th of January, 1865, that is to say, after Lownsdale's death, a patent issued conveying to Lownsdale his half of the tract; this part including, as already said, the lots 5, 6, 2, and 7, in block 13.

By the common law, of course, such a patent would have been void. An act of Congress of May 20th, 1836 (5 Stat. Large, 31), gave it validity be enacting—

"That in all cases where patents for public lands have been * * * issued to a person who had died * * * before the date of such patent, the title to the land designated therein shall inure to, and be vested in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

Whatever Lownsdale's interest was, vested, therefore, in his heirs.

In this state of things, Lamb and others, who were a portion of his heirs, file a bill against the residue of them, to have a partition of these lots, and made Davenport a party as a person in possession and claiming the whole of them.

In the progress of the suit, Davenport filed a cross-bill, in which, while admitting the legal title to the lots to be in the plaintiffs and the other heirs of Lownsdale before the court, he asserted that he was the rightful and equitable owner of them and prayed for a decree against the heirs of Lownsdale for a conveyance of the title.

The court decreed as prayed by Davenport, and the complainants in the original bill brought this appeal.

Messrs. G. H. Williams and *W. L. Hill* for the appellants.

Prior to the 27th of September, 1850, the date of the passage of the donation law, neither party to this controversy, nor those under whom they claim, except the United States, had any title to, or interest whatever in, the premises in dispute, or in said land claim. This in effect, was so declared by the Supreme Court of the United States in the case of *Lownsdale* v. *Parrish* (21 Howard, 293.) The Supreme Court of Oregon, in *Leland* v. *City of Portland*, (2 Oregon, 48; and see *Lownsdale* v. *City of Portland*, Deady, 1), says:

"Any acts (of parties) before the 27th of September, 1850, affecting the disposal of lands in Oregon were simply void."

It follows that no form of conveyance made prior to the passage of the Donation Act could operate to transfer any interest, either legal or equitable, in the land, and that a conveyance, without covenants for further assurance, would be ineffectual for any purpose except perhaps to transfer the bare occupancy. A purchaser could not have been deceived. He must have known that he could obtain nothing but naked possession, no matter what the deed said.

Again, the fourth section of the Donation Act invalidated all future sales.

of lands which the act gave, if made before the party got a patent.

The result was that prior to the 27th of September, 1850, parties had no interest whatever in land in Oregon, and that while after that time they could acquire the title thereto, their contracts for the sale thereof, before their title became complete under the provisions of the act, were void. We submit, therefore, that Davenport could derive no benefit from any so-called sale of the four lots in question made subsequent to the aforesaid date, nor claim them on account of any deed made prior to that time; and that all such contracts and deeds must be construed in view of this condition of circumstances.

This invalidates the whole of the tripartite agreement of March 10th, 1852, (the latest written agreement between Lownsdale, Coffin, and Chapman); for it was all made after the passage of the act.

The donation law was not retrospective in its operation, nor did it vest rights of an equitable character which related back to the date of the settlement. There is nothing in the act that justifies the position that it did.

Descending more to particulars, and as to Davenport: To no one of the four lots did Davenport acquire any title till after the date of the Donation Act; while as to two of them, Nos. 2 and 7, even Coffin's conveyance of them was posterior to the act. The sale to him in the case of each one of the four lots was the sale of lands by a party who was claiming the benefits of the Donation Act; and, to say the least, came within the mischief which the prohibitory clause in question was intended to prevent.

Further: The agreement of March 10th, 1852, is a deed *inter partes*—Lownsdale, Coffin, and Chapman. We know of no principle of law which would allow Davenport, a person not a party to the instrument—an instrument under seal, and executed as that evidently was, to settle and adjust the personal individual

rights of the parties to it as between themselves—to claim the benefit of its provisions as a matter of legal right. (See *Ellison* v. *Ellison*, 1 Leading Cases in Equity, 232.)

Finally: Under the Donation Act the heirs of Lownsdale (he being dead before the patent issued) took not by descent but by purchase. (*Fields* v. *Squires*, 1 Deady, 382; *Delay* v. *Chapman*, 3 Oregon, 459.) They took not through him, but under the act.

The land which Congress thus gave them would not have been subject to his debts, nor is it to his contracts. It never vested in him. In *Davenport* v. *Lamb* (13 Wallace, 431), the Circuit Court held that under the act the husband did not take as heir to his wife, but as statutory donee; and this view was not denied in this court.

Messrs. J. M. Carlisle and *J. D. McPherson, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

There is no question that at the commencement of the suit the legal title to the lots was in the heirs of Lownsdale.

The equity which Davenport sets up in his cross-bill arises from transactions antecedent to the issue of the patent certificate of Lownsdale, and, indeed, antecedent to the enactment of the donation law by Congress, under which Lownsdale's title originated.

It is not necessary to recite in this opinion all of those transactions. It is sufficient here to say that several years before that act was passed, and before any act of Congress existed by which title to the land could be acquired, settlement on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots and lots sold, and that these are a part of the present city of Portland. Of course no legal title vested in any one by these proceedings, for that remained in the United States; all of which was well known and undisputed. But it was equally well known that these possessory rights and improvements placed on the soil were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary; and though these rights or claims rested on no statute or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well-understood value to these

claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts. (*Sparrow* v. *Strong*, 3 Wallace, 97; *Myers* v. *Croft*, 13 *Id.*, 291; *Davenport* v. *Lamb*, *Ib.*, 418; *Thredgill* v. *Pintard*, 12 Howard, 24.)

Acting on these principles, the tract of land in question, valuable for a town site, seems to have become the subject of controversies, and of contracts and agreements, which culminated in an amicable arrangement between Lownsdale, Coffin, and Chapman, by which the rights of each were recognized and adjusted among themselves. The first of these agreements, reduced to writing, was made before the passage of the donation law; the last seems to have been made in consequence of that enactment, and was evidently designed to give effect to their previous compromise agreements, to enable each to acquire under that act the title to the property, according to those agreements, and to protect each other and their vendees when the title should have been so acquired. We are satisfied that by the true intent and meaning of these agreements the equitable right to all the lots in controversy had been transferred by Lownsdale to Coffin before the passage of the Donation Act, and that as between Lownsdale, Coffin, and Chapman, the equitable interest, such as we have described it, of the lots in controversy, was in Coffin or his vendees.

The record shows that this interest or claim, whatever it was, at the commencement of this suit was vested in Davenport, while the legal title was in the heirs of Lownsdale.

According to well settled principles of equity, often asserted by this court, Davenport is entitled to the conveyance of this title from those heirs, unless some exceptional reason is found to the contrary.

Counsel for appellants urge two propositions as inconsistent with this claim of right on behalf of Davenport:

1. It is said that the proviso to the fourth section of the Donation Act renders void the agreements between Lownsdale, Coffin,

and Chapman. The proviso referred to, declares that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he may be entitled under the act, before he or they have received a patent therefor, shall be void. The act was, on its face, intended to cover settlements already made, and the careful limitation of this proviso to future contracts of sale, that is, sales made after the passage of the act, raises a strong implication of the validity of such contracts made before the passage of the statute. It was well known that many actual settlers held under such contracts, and while Congress intended to protect the donee from future improvident sales, it left contracts already made, undisturbed.

But counsel, resting solely on the latest written agreement between Lownsdale, Coffin, and Chapman, insist that it was void, because made after the Donation Act was passed.

That agreement was only designed to give effect to the previous contracts on the same subject, and is in accord with the spirit of the proviso. And if this latter agreement is rejected as altogether void, it is still apparent that, by the contracts made prior to the Donation Act, the equitable right of Coffin to these lots is sufficiently established.

The same error is found in the argument that two of the lots in controversy were sold by Coffin after the passage of that act, and the sale is, therefore, void. The answer is, that Coffin is not the donee who takes title under the act of Congress, but Lownsdale, and Lownsdale had made a valid agreement by which his interest in them was transferred to Coffin, before that statute was passed.

2. The Donation Act provides that where the settler has a wife, the quantity of land granted is double that to a single man, and that one-half of it shall be set apart to the wife by the surveyor general, and the title to it vests in her, and that if either of them shall have died before the patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased.

Lownsdale's wife died first, and both before the patent issued. But, prior to the death of either, Mrs. Lownsdale's half had been set apart to her, and did not include the lots now in controversy. It is said that the title vested in the heirs of Lownsdale, under the peculiar provision of this statute, is one of purchase, and not of inheritance, and that it comes to them directly from the gov-

ernment, divested of any claim of third parties under Lownsdale.

This proposition was much discussed in the case of *Davenport* v. *Lamb* (13 Wallace, 418, already cited), but the court did not then find it necessary to decide it, as the only parties who were entitled to raise the question, had not appealed from the decree of the circuit court.

Nor do we propose to decide, now, whether the title in the hands of the children and heirs of Lownsdale would be liable for his debts, or to what extent that title might be effected by the contracts of Lownsdale, concerning the land itself, made after the passage of the Donation Act, or after his assertion of claim under it. Nor do we decide whether the interest in the wife's share of the land, which came to him by survivorship, would be affected by any contracts of his or hers, made before her death, at any time.

But we hold that, as to the portion of the land which was allotted to him by the surveyor general, and the title of which vests in his heirs by the act of 1836, without which the patent would be void, his contract of sale made before the Donation Act was passed, and while he was the owner of the possessory interest before described, was a valid contract, intentionally protected by the Donation Act itself, and binding on the title which comes to his heirs by reason of his death.

These considerations dispose of the case before us, and the decree of the circuit court is accordingly *Affirmed*.

NOTE.—A covenant by a settler on unsurveyed land, that he will purchase the land as soon as it is surveyed and offered for sale, and then mortgage it to a creditor, will be enforced as an equitable mortgage, after the party has entered the land. *Wright* v. *Shumway*, 1 Bissell, 23.

For further decisions under the Oregon Donation Act, see *Lamb* v. *Wakefield*, 1 Sawyer, 251; *Wythe* v. *Palmer*, 3 Sawyer, 412; *Adams* v. *Burke*, 3 Sawyer, 415; *Hall* v. *Russell*, 3 Sawyer, 506.

COFIELD *v.* MCCLELLAND.

December Term, 1872.—16 Wallace, 331.

1. A bill to compel a conveyance from a person to whom the probate judge of Arapahoe county, Colorado Territory (in which county is situated Denver), had conveyed a lot in pursuance of the acts of Congress of May 23d, 1844, and May 28th, 1864, for the relief of the

city of Denver, and of the act of Colorado Territory of March 11th, 1864, dismissed:

1st. Because the defendant was in possession of the lot in question at the time of the passage of the act for the relief of the city of Denver, and at the time of the entry of the lands made by the probate judge, by means of which he became and was the party by law entitled to the deed from the probate judge; and

2d. Because the appellant, by omitting to sign and deliver the statement required by section four of the territoral statute, became barred of the right to the lands, both in law and equity.

2. Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given.

APPEAL from the Supreme Court for the Territory of Colorado; the case being thus:

The city of Denver, which is in the county of Arapahoe, Colorado Territory, was origionally laid out by a company or association of persons, on the public domain of the United States, before the same had been surveyed and became subject to entry. And the company was aided by the privileges of pre-emption, at the minimun price, being secured to settlers and occupants of lots by thegeneral enactment of May 23d, 1844 (5 Stat. at Large, 657), "for the relief of the citizens of the towns upon the land of the United States under certain circumstances," and by a special enactment "for the relief of the citizens of Denver," of the 28th of May, 1864 (13 Stats. at Large, 94), whereby the probate judge of the county was constituted a trustee to enter the land selected for the site of the town, when the same became subject to entry, and to pass the legal title to the settlers and occupants of lots, under rules and regulations prescribed by the legislative authority of the Territory of Colorado.

These acts being in force, the probate judge of Arapahoe county having, on the 6th of May, 1865, entered the town side under the acts referred to, on the 10th of May, 1865, and in accordance with the directions of a Territorial Act of Colorado, of March 11th, 1864, advertised for four weeks thereafter in a weekly newspaper published at Denver, (though whether also by posting notices in three public places in the town, which a Territorial Act of Colorado required, did not appear, the judge himself being dead), the fact that he had made the said entry, and that all claimants of lots in the town should within ninety days present their claims to him.

Mrs. Louisa McClelland, then, as the evidence in the case went strongly to show, in occupation of lot No. 6, block 69, in Denver, and who had erected valuable improvements on it, and was then paying taxes upon it—all without apparent knowledge of any counter-claim—accordingly presented her claim for the said lot, and there being no counter-claim made to it by any one, the probate judge, on the 11th of August, 1865, conveyed the said lot to her. She being thus in possession, one Cofield, in April, 1869, filed a bill against her to compel a conveyance to him. The bill alleged an equitable title to the lot in the complainant by the occupation and possession; a prior settlement, to wit: By a certain Preston, in 1859, a conveyance by Preston to one Hall, and after several intermediate conveyances, by which the lot came to one Bates, a conveyance by Bates to the complainant in 1869. (There was also an allegation of collusion with the probate judge, but this was denied on the answer, being wholly disproved, and being put aside by the court, need not be noticed.)

The court below having dismissed the bill, the complainant took this appeal.

Mr. J. M. Woolworth for the appellant.

Messrs. Bartley & Casey contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The territory upon which stands the city of Denver, Colorado, was entered upon, occupied and possessed by numerous persons before the same was surveyed and had become subject to public entry. Occurrences like the one which gives rise to this bill, seem to have been common, and the rights of the parties were protected and regulated by an act of Congress passed May 23d, 1844. A special act was also passed by Congress on the 28th of May, 1864, "for the relief of the citizens of Denver." It is by the principles prescribed in these several statutes that the rights of the parties in this suit are to be determined.

The first of the acts to which reference has been made (May 23d, 1844, 5 Stat. at Large, 657), authorizes the probate judge to enter, at the proper land office, the land settled and occupied by such occupants of a town or city. It is also enacted that such entry by him shall be "in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under

such rules and regulations as may be prescribed by the legislative authority of the State or territory in which the same is situated."

The act "for the relief of the citizens of Denver, in the Territory of Colorado" (May 28th, 1864, 13 Stat. at Large, 94), authorthorizes "the probate judge of Arapahoe county to enter, at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the *bona fide* owners of the improvements thereon, according to their respective interests, the following legal subdivisions of land," describing certain specific divisions, of which the lot in question is a portion.

The act of the territorial legislature of Colorado, passed March 11th, 1864, contained numerous provisions regulating the rights of settlers, and the manner in which their rights shall be ascertained. The second section enacts that the title from the probate judge shall be in trust for and conveyed to "the person or persons who shall have, possessed, or be entitled to the possession or occupancy thereof, according to his, her, or their respective rights or interest in the same, as they existed in law or equity, at the time of the entry of such lands, or to his, her or their heirs or assigns."

This regulating act of the territory is in harmony with the acts of Congress. It expresses more explicitly than do those acts, the statement that the occupation and possession which gives the right, is that which exists at the time of the entry of the lands by the probate judge. Those in possession of the land when the entry shall be made by the probate judge, are the persons for whom he holds the lands in trust, and to whom he is to make the respective deeds. Although less explicitly declared, this is the construction and meaning of the acts of Congress also.

The land on which the city of Denver stands was entered by the probate judge in May, 1865. The evidence is strong and quite convincing that, at that date, as well as at the time of the passage of the enabling act (May, 1864), Mrs. McClelland, the defendant, was in the actual possession of lot No. 6, with valuable improvements made thereon, and paying the taxes on the same. Such must have been the conclusion of the court below, and we concur in it. The result is fatal to the plaintiff's right of recovery.

Again, section three of the Territorial act, to which reference has been made, makes it the duty of the judge entering the land, within thirty days after such entry, by posting a notice in three

public places and by publishing the same in a newspaper of the town, if there be one, to give notice of such entry.

This notice is required to be published once in each week, for three weeks, and to contain an accurate description of the lands so entered. It was published by the probate judge in a newspaper published at Denver, for four weeks, commencing May 10th, 1865. The judge was not living at the time of the trial, and there was no evidence that the notice was posted in three public places in the town.

We think this is a case in which the presumption applies that the officer has done his duty, especially as no provision was made in the act for procuring the evidence that notice had been published. The case comes within the rule so well settled in this court, "that the legal presumption is that the surveyor, register, governor, secretary of State, have done their duty in regard to the several acts to be done by them in granting lands, and, therefore, surveys and patents are always received as *prima facie* evidence of correctnesss." (See the numerous cases cited in Cowen & Hill's notes to Phillip's Evidence, note 174, "Presumptions.")

Section four of the Territorial Act, to which reference has been made, enacts as follows:

"§ 4. Each and every person or association, or company of persons, claiming to be an occupant or occupants, or to have possession or to be entitled to the occupancy or possession of such lands, or to any lot, block, or share therein, shall, within ninety days after the first publication of such notice * * * sign a statement in writing, containing an accurate description of the particular parcel or parts of land in which he claims an interest * * * and deliver the same into the office of the judge or judges, and all persons failing to sign and deliver such statement within the time specified in this section, shall be forever barred the right of claiming or recovering such lands or any interest or estate therein * * * in any court of law or equity."

No language could be more explicit to make the failure to deliver the statement within the time specified a bar, an absolute bar, to the recovery of the same, however strong might be the equitable claim to the land so lost.

This regulation is a reasonable one. In a crowded district, with a changing frontier population, it might well be required that the claim should be interposed at an early day.

It is not pretended that the appellant, or any one on his behalf, made the statement required by section four. Its absence bars his claim in every court either of law or equity.

For the two reasons stated—

1st. That the defendant below was in possession of the lot in question at the time of the passage of the act for the relief of the city of Denver, and at the time of the entry of the lands made by the probate judge, by means of which she became and was the party by law entitled to the deed from the probate judge; and—

2d. That the appellant, by omitting to sign and deliver the statement required by section four of the territorial statute, became barred of the right to the lands, both in law and equity. We are of the opinion that the judgment of the court below, dismissing the complaint, was correct, and that it must be *Affirmed.*

NOTE.—The mere survey and platting of a town site on public land without following it up by entry gives no right to the land. *Weisberger* v. *Tenny*, 8 Minn., 456; *Carson* v. *Smith*, 12 Minn., 546.

An occupant before entry has an interest in the land occupied that may be conveyed, and the recording laws of the State apply to such conveyances. *Barnes* v. *Murphy*, 3 Minn., 119.

The rights of the occupants are fixed at the time the proof before the register and receiver is made or offered. *Leech* v. *Ranch*, 3 Minn., 448; *Castner* v. *Gunther*, 6 Minn., 119; *Mankato* v. *Meagher*, 17 Minn., 265; *Harrington* v. *St. Paul and S. C. R. R. Co.*, 17 Minn., 215.

To entitle a person to the benefit of the act he must be in possession of the premises personally or by having a tenant or agent on the land. *Carson* v. *Smith*, 12 Minn., 546.

The entry when made relates back to the date of proof and application to enter; and if an occupant entitled dies after proof, but before payment, the title descends to his heirs, and their right will not be defeated by the widow obtaining the title in her own name and conveying it to another. *Coy* v. *Coy*, 15 Minn., 119.

The mere fact of being an occupant does not necessarily give an interest in the town site; they must be also owners. One occupying as a tenant of another is not the owner; the landlord is the one entitled under the act, and not the tenant. Town companies may be occupants and owners as recognized by the State statute, and are embraced within the provisions of the act. *Windfield Town Co.* v. *Maris*, 11 Kansas, 128; *Independence Town Co.* v. *De Long*, 11 Kansas, 152.

Under the act of April 6th, 1854, authorizing the entry of the town site of Council Bluffs the person who was the occupant at the time the deed should be executed by the mayor is the one entitled under the act, and not the occupant at the date of the act of Congress. *Hall* v. *Doran*, 6 Iowa, 433.

The probate judge in ascertaining to whom deeds should be made under the town site act does not act judicially, and his decisions may be reviewed by the courts. *Ming* v. *Truett*, 1 Montana, 322; *Hall* v. *Ashley*,

2 Montana, 489, and *Edwards* v. *Tracy*, 2 Montana, 49. Also see *Denver* v. *Kent*, 1 Colo., 336, and *Treadway* v. *Wilder*, 9 Nev., 67.

The trust is to be executed by the probate judge under such rules and regulations as may be prescribed by the legislature; but should the legislature authorize the probate judge to enter a town site and to give "first to James K. Paul a deed of such lots as he holds or may hold free from the claim of any other person, by virtue of an equitable pre-emption claim thereto, and to all other occupants deeds to each severally of the lots held by them by virtue of contracts made with said James K. Paul," thus undertaking to dispose of the whole trust to the person named and his grantees, and authorizing no one else to be considered or receive any relief, is in direct violation of the act of Congress, and therefore void. *Selby* v. *Cash*, 6 Mich., 193.

After a town site has been laid out on public land the plan of the city cannot be changed so as to take the property of a *bona fide* occupant and claimant. *Alemany* v. *City of Petaluma*, 38 Cal., 553.

For a construction of the act on other points see *McTaggart* v. *Harrison*, 12 Kansas, 62; *Sherry* v. *Sampson*, 11 Kansas, 611; *Clark* v. *Fay*, 20 Wis., 478; *Perry* v. *Superior City*, 26 Wis., 64; *Lechler* v. *Chapin*, 12 Nev., 66; *Jones* v. *City of Petaluma*, 36 Cal., 230, and 38 Cal., 397; and *Smith* v. *Pipe*, 3 Colo., 187.

SALLY LADIGA, plaintiff in error, *v.* RICARD DE MARCUS ROLAND AND PETER HIEFNER, defendants.

January Term, 1844.—2 Howard, 581; 15 Curtis, 211.

Under the treaty between the United States and the Creek tribe of Indians of March 24, 1832 (7 Stats. at Large, 366), it was *Held*:

1. That the twenty sections of land to be selected by the President for the orphan children of the tribe, were not to be taken from the land reserved for the tribe by the preceding stipulations of the treaty.

2. That a grandmother, with whom some of her grandchildren resided, was the head of a family, and entitled to a half-section of land, as such.]

ERROR to the Supreme Court of the State of Alabama, in an action of trespass *quare clausum*. Both parties claimed title under the provisions of the treaty of Washington, of March 24, 1832, between the United States and the Creek tribe of Indians: the plaintiff in error, under the second article of the treaty, as the head of a family, and the defendants as purchasers under a sale of selections of lands made by the President for the orphan

children of the Creeks, pursuant to another clause of the same article.

The material articles of the treaty are as follows:

"Art. I. The Creek tribe of Indians cede to the United States all their lands east of the Mississippi river.

"Art. II. The United States engage to survey the said land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed to allow ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half-section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in one body in a proper form. And twenty sections shall be selected, under the direction of the President, for the orphan children of the Creeks, and divided and retained or sold for their benefit, as the President may direct. Provided, however, that no selection or locations under this treaty shall be so made as to include the agency reserve.

"Art. III. These tracts may be conveyed by the persons selecting the same, to any other persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be valid till the President approves the same. A title shall be given by the United States on the completion of the payment.

"Art. IV. At the end of five years all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee-simple from the United States.

"Art. V. All intruders upon the country hereby ceded, shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting, however, from this provision, those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from the selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

"Art. VI. Twenty-nine sections, in addition to the foregoing, may be located, and patents for the same shall then issue to those persons, being Creeks, to whom the same may be assigned by the Creek tribe.

"Art. XV. This treaty shall be obligatory to the contracting parties, as soon as the same shall be ratified by the United States."

The material facts and the instructions and refusals of the court were stated in substance as follows in the bill of exceptions:

It was proved that said plaintiff, at the date of treaty aforesaid, to wit, on the 24th of March, 1832, and long anterior to that period, and from thence to the present time, was and is the head of the Creek Indian family residing in and having an improvement upon the E. half of section 2, township 14, range 8 E., &c., in the district of land subject to sale at Mardisville, in the State of Alabama, which land is situate in Benton county, and is the same sued for in this action.

It was further proved that at no time was there any other Indian improvement on the said land, and that the improvement and residence of the plaintiff alone was embraced in said half-section by the legal lines of survey, and that plaintiff had lived there for many years, and raised a numerous family of children.

It was further proved by the production of the census-roll taken by order of the government of the United States of the heads of families of the Creek tribe, in conformity with the second article of the treaty aforesaid, that the plaintiff was duly enrolled by the agent of the United States charged with this duty as one of the heads of families belonging to the said Creek tribe, and as entitled to land under said treaty, her identity being shown by the witnesses.

That in 1834 the government, by agents charged with this duty, located the Indians. That the formula of location, as practiced by said agent, consisted in calling the Indians belonging to the respective Indian towns together, and, in the presence of the chiefs and head men in the town, the agent would call over the names registered by the enrolling agent as being the heads of families in that town. That the persons whose names were so registered would appear and answer to their names and their identity and residence, and also their improvements would be proved, &c., pointed out by the chiefs and head men so assembled, and the agent would then designate by figures and letters the land opposite the name of each reservee on said census roll to which he supposed them entitled under the treaty.

That, upon the agent coming into the Tallasahatchee town of Indians for the purpose of making the locations aforesaid, the plaintiff appeared before him, and being identified as the same whose name was enrolled on the census list of said town, claimed the land in dispute, on which her improvement at the date of the

treaty aforesaid was situated, and which she then informed him she had selected as her reservation, there being no other improvement, location, or conflicting claim thereto at that time. That the deputy locating agent, who located the town to which she belonged, not regarding her the head of a family by reason of her children having married and left her, and none but orphan grandchildren residing with her, refused to recognize her rights under the treaty, or set apart the land so by her selected opposite her name on the roll, as in other cases. That from the date of the treaty aforesaid until the year 1837 she made continual and repeated applications to the government officers to assert her rights to said land, and through them to the government itself, until, in 1837, she was forced to leave the country and emigrate to Arkansas, by the armed troops in the employ and under the directions of the government.

That she never had abandoned her claim, but insisted on her right under the treaty, to enforce which this action was brought. M. M. Houston, who was the locating agent, testified as to the reasons which induced him to refuse a recognition of plaintiff's right.

The defendant then introduced a patent or grant from the United States, signed by the President, Martin Van Buren, dated the 21st day of December, 1837, which, after reciting that by virtue of the treaty aforesaid of the 24th March, 1832, between the United States and Creek tribe of Indians, the United States agreed that twenty sections of land should be selected, under the direction of the President, for the orphan children of said tribe, and divided and retained or sold for their benefit, as the President might direct; and that the President in making such selection had included section 2, township 14, range 8 east, and divided the same into quarter-sections; and said tract having been sold pursuant to instructions, Canton, Smith, and Heifner had become the purchasers of the southeast quarter of said section, which purchase had been sanctioned and approved by the President on the 3d November, 1836—gave and granted to said Canton, Smith, and Heifner the said southeast quarter, to them, their heirs, &c., forever, as tenants in common, and not as joint tenants: which grant being properly attested was read to the jury. Another patent or grant from the government of the United States, similar in all its forms to that above named, and containing like recitals, bearing the same date and properly authenticated, conveying the

northeast quarter of said section to Richard de Marcus Roland, was offered and read to the jury; and this being all the testimony, the plaintiff's counsel asked the court to charge the jury as follows:

1. That if they believe from the evidence that the defendants were in possession of the land sued for at the institution of this suit, and continued to hold the same adversely, receiving the rents and profits thereof, and that if from the evidence the jury were further satisfied that the plaintiff at the date of the treaty made and concluded at the city of Washington between the United States of America and the Creek tribe of Indians east of the Mississippi river, to wit, on the 24th day of March, 1832, was the head of a Creek Indian family, and that the United States enrolled her name under the provisions of the treaty aforesaid, requiring a census to be taken, &c., as the head of a Creek family, and that said plaintiff before and at the time of the ratification of said treaty, and from thence until she was forced to leave the country by the United States, possessed said lands sued for, having an improvement and residence upon the same; and if the jury believe from the testimony that said plaintiff did select the said half section including her improvement, and that such selection was so made without conflicting with the rights of any other Indian, or the rights or duties of the government reserved, secured, or prescribed by the treaty aforesaid, and if the proper officers of the government were duly notified of such selection by the said plaintiff, and that she had never forfeited her rights by a voluntary abandonment of the lands sued for, but had been compelled by force or coercion on the part of the United States to emigrate from the country and leave the land, then the plaintiff is entitled to recover in this action.

2. The plaintiff asked the further charge: that under the second article of the said Creek treaty of the 24th March, 1832, each head of a Creek Indian family, after the land ceded by said treaty had been surveyed, was entitled to select a half-section of land so as to include their improvement, if the same could be made; and if the jury believe from the proof that the plaintiff was the head of a Creek family, and entitled to a selection under the treaty, and that after such survey she could select and did select the half-section in dispute, and in a reasonable time notified the government of such selection, and had never voluntarily abandoned said land, then plaintiff in such case acquired a vested right to said land inchoate, but sufficient under the laws of this State, coupled

with possession, to maintain this action, and that such right could not be defeated by the subsequent disposition of the same by the United States to the defendants.

3. The plaintiff asked the court further to charge the jury that, if the plaintiff was entitled to select a half-section of land under the treaty aforesaid, as the head of a Creek family, duly enrolled as such, and the selection could have been so made, and was so made, as to include her improvement within the selection, that, in such case, the treaty itself located the plaintiff; and if the government, with a knowledge of such selection and location, exposed the land to sale, or reserved it for other purposes, such sale or disposition could not prejudice the right of the plaintiff. All which charges the court refused to give, and in lieu of them charged the jury: that, notwithstanding the plaintiff was the head of a Creek family, duly enrolled as such by the authorized agent of the government, and entitled to select a half-section under the second article of the treaty of the 24th March, 1832; and that, although after the land ceded by the treaty aforesaid had been surveyed, she could have selected, and did select, the half-section in dispute, which included her improvement, and of which selection she duly notified the government, yet the refusal of the locating agent to recognize her right, and to set apart the land by a designation of it opposite her name upon the roll, as in other cases of location, coupled with the subsequent sale and grants of the same land to the defendants by the United States, whether right or wrong, divested the plaintiff of all right to said land, and vested in the defendants in this action titles paramount, which the plaintiff could not gainsay or dispute. To which refusals of the court to give the charges asked by the plaintiff, and to the charge given in lieu of them by the court, the plaintiff excepted, and the judgment of the county court having been affirmed by the Supreme Court of Alabama, this writ of error was brought.

Coxe for the plaintiff in error.

No counsel *contra*.

BALDWIN, J., delivered the opinion of the court.

Both parties claim the land in controversy under the United States, in virtue of the treaty of Washington, made on the 24th March, 1832, between the United States and the chiefs of the Creek tribe of Indians. The decision of the Supreme Court of

Alabama was against the title set up by the plaintiff; the case is therefore properly brought here under the 25th section of the Judiciary Act of 1789. (1 Stats. at Large, 85.) (The articles of the treaty are set forth in the statement of the case, *ante*.) By an inspection of the second article, it will be seen that there are three distinct classes of selections to be made from the ceded lands, for the benefit of the Indians, after the lands are surveyed.

1. The United States engage to allow ninety principal chiefs to select one section each.

2. And every other head of a Creek family to select one half-section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census is to be taken of these persons, and the selections are to include the improvements of each person within his selection.

3. And twenty sections shall be selected under the direction of the President, for the orphan children of the Creeks, and divided, retained or sold for their benefit, as he may direct.

By article third, these tracts may be sold by the persons selecting them to any persons, as the President may direct, and a title shall be given by the United States on the completion of the payment of the consideration. The fourth article stipulates that, at the end of five years, those entitled to these selections, who are desirous of remaining, shall receive patents; and, by article fifth, all intruders shall be removed from these selections, for five years after the treaty, or until the same are conveyed to white persons. By article sixth, twenty-nine sections more may be located, and patents shall issue to the Creeks, to whom the same may be assigned by the tribe. The fifteenth article makes the treaty obligatory on the parties, when ratified by the United States.

The engagements of the treaty then are, to allow the chiefs and heads of families to select, for their own use, and reserve from sale for five years, the lands selected, that they may be sold and conveyed, with the approbation of the President, and titles to be given by the United States on payment of the purchase-money, and at the end of five years to give patents to all who are entitled to select and desirous of remaining, and to remove intruders from their selections during that time, till they are conveyed to white persons.

The lands to be selected for the orphans are placed under the exclusive direction of the President, as to their location and dis-

position, and are not embraced in the third or fourth articles, which are confined to selections made by the Indians themselves. These are expressly reserved from sale for five years, whereas the selections for orphans may be made and the land sold at any time the President directs.

No authority is given to the President to direct the selection of the twenty sections for orphans, on or out of those made by the chiefs or the heads of families, or those sections which the tribes may assign under the sixth article; all the lands so selected or located are placed beyond the power of any officer, consistently with the obligatory engagements of the treaty on the United States. In directing the selections for orphans, the treaty did not intend, and cannot admit of the construction, that they might be made on lands selected according to the first part of the second article. The provisions of the treaty were progressive; that relating to orphans is entirely prospective. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forward, not backward, and are never to be construed retrospectively, unless the language of the act should render that indispensable. No words are found in the act which renders this odious construction indispensable." 2 Pet., 434. The last clause in this article cannot have been intended to annul or impair a title which was valid under the first clause, and guaranteed from intrusion under the fifth article for five years, unless sooner sold. S. P. 9 Wheat., 479.

Thus taking the treaty, and applying it to the evidence given at the trial, the instructions prayed of the court, and those given to the jury, it will not be difficult to decide in which party is the right of this case.

The plaintiff "proved substantially the following facts." (For the facts proved upon the trial, see the statement of the reporter.)

From the evidence it appears that the plaintiff claimed under the first, and the defendants under the second clause of the second article of the treaty; that the plaintiff was the head of a family within the description, and had complied with all the requisites of the treaty, had selected the tract whereon her improvements were, where she resided before, at the time of the treaty, and until her expulsion therefrom by military force, on the frivolous pretence that she was not the head of a family, her children having married and left her, and none but her grandchildren

lived with her. The defendants claimed under the second clause of the second article, relating to orphans' selections, by two patents dated in 1837, each for a quarter-section, being the two halves of the half-section selected by the plaintiff, which patents issued pursuant to sale made by the agent appointed by the President, and affirmed by him in November, 1836, five months before the expiration of five years from the ratification of the treaty, and while the land was expressly reserved from sale. The defendants gave no other evidence of title.

This sale was a direct infraction of the solemn engagements of the United States in the treaty. Though approved by the President, if the plaintiff had previously selected it according to the stipulations of the treaty, in such case the sale was a nullity, for want of any power in the treaty to make it.

The President could give no such power, or authorize the officers of the land office to issue patents on such sales; they are as void as the sales, by reason of their collision with the treaty. The only remaining inquiry is into the plaintiff's title. No other objection has been made to it, than the refusal of the locating agent or his deputy to recognize her right under the treaty, or to set apart the land so located by her opposite her name on the roll, as in other cases, solely for the reason he assigned. We cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty; it must shock the common sense of all mankind even to doubt it. It is as incompatible with the good faith and honor of the United States, and as repugnant to the Indian character, to suppose that either party to the treaty could contemplate such a construction to their solemn compact, as to exclude such persons from its protection, and authorize any officer to force her from her home into the wilds of the far West. Such an exercise of power is not warranted by the compact, and the pretext on which it was exercised is wholly unsanctioned by any principle of law or justice.

Having a right by the treaty to select the land of her residence; having selected and been driven from it by lawless forces, her title remains unimpaired. She has not slept on her rights, but from 1832 to 1837 has made continuous and repeated applications to the government officers to assert her rights to said land, and through them to the government itself in 1837. She has never abandoned her claim, but has insisted on her rights under the treaty.

In our opinion, the plaintiff not only has a right to the land in question under the treaty, but one which it protects and guarantees against all the acts which have been done to her prejudice; and we are much gratified to find in the able and sound opinion of the Supreme Court of Tennessee, on the Cherokee treaty of 1819, (7 Stats. at Large, 195,) and the Supreme Court of Alabama on this treaty, a train of reasoning and conclusions which we very much approve, and are perfectly in accordance with our opinion in this case. These cases are reported in 2 Yerger, 144, 432; 5 Yerger, 323; 5 Porter, Alabama, 330, 427.

The judgment of the Supreme Court of Alabama is therefore

Reversed.

1. A married woman having been deserted by her husband, held to be "the head of a family," and entitled to land as such under the treaty. *Wells* v. *Thompson*, 13 Ala., 793.

Under the Choctaw treaty of September 27, 1830, a white man who had married into the nation and was recognized by the Choctaws as the head of a family, was entitled to land as such. *Turney* v. *Fish*, 28 Miss., 306.

WILSON *v.* WALL.

December Term, 1867.—6 Wallace, 83.

1. *Semble*, that under the treaty of the United States with the Choctaws, in 1830, by which the United States agreed that each Choctaw head of a family desirous to remain and become a citizen, &c., should be entitled to one section of land; "and in like manner shall be entitled to one-half that quantity *for* each unmarried child which is living with him over ten years of age, and a quarter-section *to* such child as may be under ten years of age, *to adjoin the location of the parent*;" no trust was meant to be created in favor of the children. They were named only as measuring the quantity of land that should be assigned to the head of the family.
2. However this may be, if under the assumption that no trust was meant to be created, the United States have issued under the treaty a patent to a Choctaw head of a family, individually and in fee simple for all the sections, a purchaser from him *bona fide* and for value will not be affected with the trust, even though he knew that his vendor was a Choctaw head of a family, and in a general way that he had the land in virtue of the treaty.
3. Where it is sought to affect a *bona fide* purchaser for value with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence.

ERROR to the Supreme Court of Alabama.

By the fourteenth article of a treaty made in 1830, between the Choctaw Indians and the United States, by which the Choctaws ceded their territories to the United States, it was thus stipulated:

"Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so by signifying his intention to the agents, &c., and thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines, and in like manner, shall be entitled to one-half that quantity *for* each unmarried child, which is living with him, over ten years of age; and a quarter-section *to* such child as may be under ten years of age, *to adjoin the location of the parent.*"

Hall was such a head of a family, and at the date of the treaty had living with him seven children, of whom three were over and four under ten years of age. This gave one section as respected himself, and two and a half sections as respected his children. Having reported to the agent of the United States in making his claim, the number and ages of his children, but not their names, he secured a reservation of three and a half sections, including the section on which he lived. In 1841, a patent issued to him directly for the whole three and a half sections; the instrument reciting that these had been "located in favor of the said William Hall as *his reserve.*" The words of grant in the patent "were to him and *to his heirs,*" with a *habendum*, "*to his or their heirs and assigns forever.*"

In 1836, anticipating the issue of the patent, he sold the whole three and a half sections for $750, which was paid him, to one Wilson, who took possession and made valuable improvements on the land.

In April, 1849, Hall himself being dead, his children, now grown up, filed a bill in the Chancery Court of Alabama, against Wilson, to recover the two and a half sections, which were granted as respected them. Wilson admitted in his answer, knowledge that Hall was a Choctaw head of a family entitled to a reservation, but denied knowledge of what article of the treaty he claimed under.

It was conceded that in ascertaining to whom the patents should issue for the lands under the treaty in question, it was not customary to take down or return to the government the names of children of heads of families, but that in executing the treaty, the agent returned the names of heads of families, with the num-

ber and ages of their children; and that in issuing the grants in fee simple, it had been customary to issue them in the form of the patent to Hall, until the year 1842. In that year an act was passed by Congress, (5 Stat. at Large, 515), directing that as to lands located for Choctaw children, the patent should issue to such "Indian child if living," and if not living, to his heirs and representatives. A statute had previously passed (5 Stat. at Large, 180), referring to article fourteenth of the treaty, and appointing commissioners with full power to examine and ascertain the names of persons who had fulfilled the conditions of settlement so as to entitle them to patents, and to ascertain the quantity for each child "*according to the limitation contained in said article.*

It also seemed that from the date of the treaty down to the act of 1842, the construction of the executive department had been, that no provision was made for children as independent beneficiaries, but that they were named as measuring the quantity of land that should be assigned to the head of the family.

At least, referring to these provisions, the Commissioner of Indian Affairs had said to the Attorney General in 1842—

"These words were construed by Mr. Secretary Cass, to give to the parent the title to the halves and quarters of a section stipulated for, in right of the children. This construction has been the uniform one of the department in executing the treaty, and patents have issued accordingly, of the correctness of which no doubt has been entertained heretofore. The register of those applied to the agent under the article, contained the names of the heads of families only, which would seem to show that the children were not entitled in the opinion of the Indians themselves who furnished the materials for the register."

On this case the questions were—

1. Whether on a true construction of this fourteenth article of the treaty, Hall himself had held the two and a half sections adjoining the one on which he lived *in trust* for his children?

2. Whether, if he had himself held the sections in trust, Wilson, a *bona fide* purchaser for value, was affected with notice of that trust, the same not having been set forth on the face of the patent to Hall?

The Supreme Court of Alabama, where the suit finally went in that State, was of the affirmative opinion on both points. (See 34 Alabama, 228.)

On the first question, that court's view was,—although a grant to one person *for* another, ordinarily created a trust,—that here the expression "*for* each unmarried child" might be admitted, if

by itself, to be equivocal. But the words immediately following, "and a quarter-section *to* such child as may be under ten," the court thought shed light on the previous obscure expression, and sufficiently indicated the sense in which it was used. This was made more plain, the court considered, by the direction that the lands given in respect to the children should "adjoin the location of the parent." What was meant by the location of the parent? Obviously the section on which the parent's "improvement" was situated, where he lived, and which was reserved to him in absolute right. Lands which *adjoined* a parent's could hardly be deemed lands of the parent himself. The construction given to the article by the executive department of the government, and the form in which the patents were issued could not, the court conceived, change the meaning of the words of the treaty, nor control any court in interpreting them. There was, therefore, a trust for the children.

On the second question, the Supreme Court of Alabama thought that as Wilson knew when he made his purchase that Hall was "the Choctaw head of a family" and that his right arose under the treaty, he ought, as a prudent man, to have inquired further. Lord Mansfield's language in *Keech* v. *Hall* (Douglas, 22), was that, "whoever wants to be secure should inquire after and examine the title deeds." Had Wilson made an examination of the treaty it would have informed him—so the court considered—that the right of Hall was confined to the single section on which his improvement was situated, and that all the rest of the land was for his children. He had failed to make an inquiry which it was his duty to make: and a court of equity would accordingly treat him as if he had actual notice.

Judgment having gone, therefore, in favor of the children, the case was now for review, here, where it was fully argued by *Mr. P. Phillips* for the appellants, in opposition to the view enforced by the State Court of Alabama, in its opinion as above presented.

No opposite counsel appeared.

MR. JUSTICE GRIER delivered the opinion of the court.

When the United States acquired and took possession of the Floridas under the Louisiana treaty, the treaties which had been made with the Indian tribes remained in force over all the ceded territories, as the laws which regulate the relations with all the

Indians who were parties to them. They were binding on the United States as the fundamental laws of Indian right, acknowledged by royal orders and municipal regulations. By these, the Indian right was not merely of possession, but that of alienation.

The parties to this contract may justly be presumed to have had in view the previous custom and usages with regard to grants to persons "desirous to become citizens." The treaty suggests they are "a people in a state of rapid advancement in education and refinement." But it does not follow that they were acquainted with the doctrine of trusts. With them lands were either held in common by the whole nation or tribe, and the families were its fractions or portions. The head of the family could dispose of the property of the family as the heads of the tribe or nation could that of the nation.

Under the Spanish and French dominions, grants of land were always made to individuals in proportion to the number of persons composing the family. Thus, in *Frique* v. *Hopkins* (4 Martin, 212), the court said as follows:

"By the regulations of the Spanish government, if the individual who applied for land was unmarried, a certain quantity was given to him; if he had a wife this quantity was increased, and if he had children an additional number of acres were conceded. Now, if the circumstances of his being married made the thing given become the property of both husband and wife, we must, on the same principle, hold that where children were the moving cause, they too should be considered as owners in common of the land conceded. *That such was the effect of the donee having a family, was never even suspected.* It *certainly is unsupported by law.* Many donations are made in which the donee's having a wife and being burdened with a large family is a great consideration for the beneficence of the donor, but this motive in him does not prevent the person to whom the gift is made from being considered its owner, nor prevent the thing from descending to his heirs."

We can hardly expect the Indians to be very profound on the subject of adverbs or prepositions, and the agents of the government do not seem to have exhibited much greater knowledge of the proprieties of grammar, or they would not have left this section of the treaty capable of misconstruction or doubt when it was so easy to avoid it. The words of this 14th section of the treaty were construed by Mr. Secretary Cass, to give to the parent the

title to the whole. This construction had been the uniform one of the department in executing the treaty, and patents were issued accordingly, of the correctness of which no doubt was entertained. The register of those that applied to the agent under the article, contained the names of the heads of families only, which would seem to show the Indian construction of the contract or treaty. Accordingly, on the 29th of June, 1841, a patent was granted to William Hall, *not* for himself and his children, but to him and his heirs. At this time the Secretary had no means of ascertaining the names of the children so that separate patents might be given them in case of a different construction given to the treaty. In all other of the numerous treaties made with the Indians (more of them made by Governor Cass than by any other person) where lands were reserved, or agreed to be granted to any Indian, the name of the grantee and quantity to be given were carefully stated in the treaty.

As this section of the treaty was capable of a different construction, Congress, on the 23d of August, 1842, in order to save something for the children from the folly or incapacity of the parent, appointed commissioners with full power to examine and ascertain the names of the parties who had fulfilled the conditions of settlement to entitle them to patents for their land, and ascertain the quantity for each child, "*according to the limitations contained in said article.*"

Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. The legislature may prescribe to the executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act.

In the Cherokee treaty, where a grant of 640 acres was given to persons "willing to become citizens," a life estate only was given to the settlers, *with reversion to his children.* This treaty makes no such provision for children. The construction given by the representatives of both parties to the treaty, and the grants issued under it were not revoked, nor could they be by mere legislative act, founded on a different construction of a doubtful

article of the treaty. The treaty only describes the person who is contingently entitled to the reservation. He must be a Choctaw, and a head of a family, and *desirous not only* to remain, but must signify to the agent his *intention to do so.*

These are conditions precedent, on the performance of which he shall, "*thereupon* be entitled to a reservation of 640 acres, and *in like manner shall be entitled* to half that quantity *for* each unmarried child which is living with him over ten years, and a quarter-section *to* such child as may be under ten years," and if they reside upon the land, intending to become citizens for five years, &c., "*a grant in fee simple shall issue*," &c.

The father alone could fulfill the conditions; he would not be entitled to the additional land unless for a child that "*was living with him.*"

The treaty did not operate as a grant, and a patent was necessary to the person who alone could perform the conditions.

We do not consider it necessary to vindicate the conclusion to which we have arrived in the case, by further argument on the grammatical construction of this section of the treaty.

Assume that the construction put on the treaty by the court below may possibly be correct. What then are the facts of the case? The complainants below have applied to a court of chancery, which should be a court of conscience, to vacate the title of a *bona fide* purchaser, who purchased and paid his money and expended a life's labor on land granted by patent from the United States, conveying a fee simple estate, which was issued by the officers of the government without intention of imposing any trust on the grantee, or limiting it on the face of the deed. It is contended that the purchaser is affected with notice of the terms of the treaty referred to in his patent.

If there be any trust for children it must be a constructive trust, which is negatived by the express terms of the grant. How can a chancellor build up by the words *for* and *to*—words of equivocal import and doubtful construction—an equitable title in the children? The fact is clear that such was not the construction under which the grantor gave the deed, or the grantee accepted it. A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, page 622, where he says:

"In *Ware* v. *Lord Egmont* the Lord Chancellor Cranworth

expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

The application of these principles of equity to the present case is too apparent to need further remark.

Judgment reversed.

1. *Held* the same under the Wyandotte treaty of January 31, 1855. *Hicks* v. *Butrick*, 3 Dill., 413; *Summer* v. *Spybuck*, 1 Kans., 394.

It was held differently under the Chickasaw treaty of May 24, 1834, *Pickens* v. *Harper*, 1 Smedes and M. Ch. (Miss.) 539.

SMITH *v.* STEVENS.

December Term, 1870.—10 Wallace, 321.

1. Under the act of Congress of May 26th, 1860, referring to the treaty of June 3d, 1825, between the United States and the nation of Kansas Indians (which reserved certain tracts of land for the benefit of particular half-breed Kansas Indians named), and granting "the title, interest and estate of the United States" to the reservees mentioned in that treaty, and providing that the Secretary of the Interior, when requested by any one of the Indians named, "is hereby authorized" to sell the piece reserved for such Indians; the reservees had no authority to sell the lands independently of assent by the Secretary of the Interior, and any such sale was void.
2. A statute granting pieces of lands to Indians, and prescribing a specific mode in which they may sell, forbids by implication, a sale independently of the mode.

ERROR to the Supreme Court of the State of Kansas, the case being thus:

By treaty of June 3d, 1825 (7 Stat. at Large, 244, 245), the

United States concluded a treaty with the Kansas Indians, containing mutual cessions of territory. The sixth article of the treaty contained a provision that there should be reserved, for the benefit of each of the half-breeds of the Kansas Indians named in it (Victoria Smith being one of them), a certain specified allotment of land out of the quantity ceded by the nation to the United States, to be located, &c.

By the eleventh article of the treaty it was stipulated that "the said Kansas Nation shall never sell, relinquish, or in any manner dispose of the lands therein reserved, to any other nation, person, or persons whatever, without the permission of the United States, for that purpose first had and obtained, and shall ever remain under the protection of the United States, and in friendship with them."

The lands were afterwards surveyed, located and numbered, according to the treaty, and the half-breed Indians took possession each of his own reservation.

Subsequently to this, that is to say, May 26th, 1860 (12 Stat. at Large, 21), Congress passed an act, which, referring to the treaty of 1825, and reciting that the land reserved "had been surveyed and allotted to each of the said half-breeds in the order in which they are named, in and in accordance with the provision of the said sixth article," enacted:

"That all the title, interest and estate of the United States is hereby vested in the said reservees, who are now living on the land reserved, set apart and allotted to them respectively by the said sixth article of said treaty; * * * but nothing herein contained shall be construed to give any force, efficacy, or binding effect to any contract, in writing or otherwise, for the sale or disposition of any lands named in this act, heretofore made by any of said reservees or their heirs."

The second section of this act provides that:

"In case any of the reservees now living, or any of the heirs of any deceased reservees, shall not desire to reside upon or occupy the lands to which such reservees or such heirs are entitled by the provisions of this act, the Secretary of the Interior, when requested by them, or either of them, so to do, is hereby authorized to sell such lands belonging to those so requesting him, for the benefit of such reservees or such heirs. * * * in accordance with such rules and regulations as may be prescribed by the Commissioner of Indian Affairs and approved by the Secretary

of the Interior; and patents in the usual form shall be issued to the purchasers of the said land, in accordance with the provisions of this act."

Section third provides that the proceeds of the sales "shall be paid to the parties entitled thereto, or applied by the Secretary of the Interior for their benefit, in such manner as he may think most advantageous to the parties."

These statutes being in force, Victoria Smith, one of the half-breeds named in the treaty of 1825, being in possession of her tract, executed, on the 14th of August, 1860, a deed to one Stevens, purporting to convey it to him, and Stevens went into possession.

About two years after this deed was made, that is to say, on the 17th of July, 1862 (12 Stat. at Large, 628), Congress, by joint resolution, repealed the above mentioned second and third sections of the act of 1860.

Victoria Smith now brought an action of ejectment against Stevens in a local State court in Kansas, to recover possession of the tract. Stevens, in bar of the suit, offered in evidence Victoria's deed of the 14th August, 1860, for the same land, but the court excluded the deed from the jury on the ground that the plaintiff, by virtue of the Indian treaty of 1825, and the act of Congress on the subject, was prohibited from executing the deed.

The Supreme Court of the State, on appeal, affirmed the ruling of the lower court, and the case was brought here to test the correctness of that decision.

Messrs. Denver, Bradley and *Hughes* for the plaintiff in error:

1. Upon the survey and location of the sections of land respectively, and the delivery of possession to the respective reservees, they were, by the terms of the treaty of 1825, and though there were no words of perpetuity in the reservations, respectively clothed with a fee simple title in those reservations. No patent was necessary to complete the title. *United States* v. *Brooks*, 10 Howard, 442; *Doe* v. *Wilson*, 23 Howard, 457, 463, 464.

2. But, if the title did not pass by the treaty, it did pass in fee by the act of Congress, 26th May, 1860, and the reservees, after that act, had the right to make a deed in fee. The words of conveyance are very comprehensive. The statute is a grant, and is to be taken most favorably for the grantees. There is nothing left in the United States which could draw to it the reversion. Words of perpetuity in such an instrument, made with such full intent, were not needed.

If they "vested" the fee in the grantees, any restraint upon alienation would have been void. They took freed from such condition, if there was one. And so Congress seem to have considered it, for they do not prohibit future alienation.

Since, then, to allow the second and third sections of this act to be restraints on the disposing power of the grantees, and to limit that power to an application to the Secretary of the Interior, by whom the sale was authorized to be made, would be a plain violation of one of the canons of the law regulating real estate, no such construction can be given, unless the intent is too clear to admit of doubt, such construction cannot prevail.

Those two sections are susceptible of a different construction, in harmony with the construction already put upon the first section. The government had already conveyed the lands to the Indians with an unincumbered title; but they desired to protect the Indians against their own improvidence, and to do so imposed this trust on the secretary, to be exercised on the application of the owner of the lands. It was a new duty assigned to the secretary, but neither in terms nor by necessary intendment does it fetter the right of the Indian to dispose of his lands as he may see fit. This view reconciles the act with the established principle of law; and this view is strengthened by the terms of the eleventh article of the treaty prohibiting the sale of the lands reserved to the nation, but not prohibiting the sale of the private reservations.

Again: There is no prohibition in either the treaty or the act of 1860 against future sales. The Indian had clearly a title to the possession with an inchoate title to the fee. Being in such possession, Victoria conveyed whatever title she had. Congress, by the joint resolution of July 17th, 1862, repealed the second and third sections of the act of 1860. This repeal operated by relation to vest in the purchaser the full title which was vested in her by the first section of the act of 1860.

Mr. J. S. Black, contra, citing *Goodell* v. *Jackson*, 20 Johnson, 694, 718, 733; *Shawnee County* v. *Carter*, 2 Kansas State, 115; *Hunt* v. *Knickerbocker*, 5 Johnson, 332–34; *St. Regis Indians* v. *Drum*, 19 *Id.*, 127; *Jackson* v. *Wood*, 7 *Id.*, 290; *Pettit's Administrators* v. *Pettit's Distributees*, 32 Alabama, 288; *Lee* v. *Glover*, 8 Cowen, 189.

MR. JUSTICE DAVIS delivered the opinion of the court.

The eleventh article of the treaty of 1825 contains a stipulation

that the nation shall not sell the specified allotment of lands reserved for the benefit of each of the half-breeds named in it (Victoria Smith being one of them) without the permission of the government, and it would seem that the contracting parties intended this prohibition to apply to the individual members of the tribe; for, if it were not so, the policy which dictated the restriction would be in danger of being defeated altogether.

It is, however, not necessary for the purpose of this suit to decide this point, as the deed in question was made after the passage of act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty. This act vested the title of the United States to the lands which the treaty had set apart for the use of the half-breeds in the reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any furture disposition of them except by the Secretary of the Interior on the request of the party interested.

There is no ambignity in the act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the legislature. It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence, and the power of Congress to impose a restriction on the right of alienation in order to accomplish this object cannot be questioned. Without this power it is easy to see there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult by the most careful legislation to protect their interest against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress in conferring the authority to sell on the Secretary of the Interior to save the lands of the reservees from the cupidity of the white race: and, if the provisions of the treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from organized communities followed them to Kansas.

In this condition of things Congress acted; and the necessity for legislation on the subject, if indeed there were need for any, is shown by the defence which is interposed to this suit.

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser.

It is hardly necessary to say that a joint resolution passed nearly two years after this transaction, removing the restriction on alienation, cannot relate back and give validity to a conveyance which, when executed, was void; nor have we any reason to suppose that Congress contemplated that any such effect would be claimed for its legislation on the subject.

Judgment affirmed.

NOTE.—The allotment of lands to the Stockbridge Indians under the act of March 3d, 1843, gave to the allottee an equitable estate in, or title to the land, which could be sold or transferred by deed, and the patent subsequently issued to him would enure to the benefit of his grantee, although his conveyance was by quit-claim deed. *Quinney* v. *Denney*, 18 Wis., 485.

The restriction against alienation contained in the Winnebago Indian treaty of August 1st, 1829, is personal to the patentee and does not extend to his heirs. *Farrington* v. *Wilson*, 29 Wis., 383. Upon the death of the patentee the land becomes subject to the payment of his debts. *Sitzman* v. *Pacquette*, 13 Wis., 291. Held the same in *Lowry* v. *Weaver*, 4 McLean, 82; *Brown* v. *Belmarde*, 3 Kans., 41.

Where the President approved a sale, made by a reservee, of his land, his successor in office cannot revoke and annul the approval. The attempt to annul the approval of his predecessor was null and void. *Godfrey* v. *Beardsley*, 2 McLean, 412.

Where the President directs that the land belonging to a reservee may be sold at a fixed price, a sale for less than the price named is void, and the President's subsequent approval of the sale will not validate it. *Harris* v. *McKissack*, 34 Miss., 464.

The laws of the State have no application as to the mode of alienation of lands granted by the Miami treaty of June 5, 1854, so long as the title

remains in the patentee, as the treaty prescribes the mode of alienation. *Mungosah* v. *Steinbrook*, 3 Dillon, 418.

The land granted to the reservee could not be sold by him without the President's approval. *Niles* v. *Anderson*, 5 How., (Miss.) 365; *Harmon* v. *Partier*, 12 Smedes & M. (Miss.) 125. But if the sale was made *bona fide*, and the conditions were not certified to as required by the treaty, by reason of the fraud of the reservee in preventing it, the conditions may be shown in a court of equity. *Anderson* v. *Lewis*, 1 Freeman Ch., (Miss.) 178.

The chiefs have no authority to dispose of the land reserved and set apart for the absentee Indians, even with the consent of the Secretary of the Interior. *Hale* v. *Wilder*, 8 Kan., 545.

A patent issued to the grantee of the reservee will give him a valid title, even if the conveyance upon which the patent issued was not under seal, provided it had been approved by the President. *Tarvee* v. *Smith*, 38 Ala., 135. A quit-claim deed will be sufficient, when approved by the President. *Nolan* v. *Gwyn*, 16 Ala., 725; *Long* v. *McDonald*, 22 Ala., 413. The land then might be sold under execution. *Jones* v. *Walker*, 47 Ala., 175.

Under the Chickasaw treaty of October, 20, 1832, a contract of lease or sale by the reservee is void, and the additonal article of the treaty of May 24, 1834, did not validate contracts previously made. *Lewis* v. *Lore*, 1 Ala., 335; *Pettit* v. *Pettit*, 32 Ala., 288.

Land reserved to the head men of the tribe could not be sold during the five years succeeding the ratification of the treaty to any one excepting Ottawa Indians. *Clark* v. *Libbey*, 14 Kan., 435; and a conveyance to an Ottawa Indian was void unless approved by the Secretary of the Interior. If such deed be not approved by the Secretary a second deed executed to another after the restrictions were removed by the five years having elapsed, will convey the absolute title, and not be affected in any manner by the previous void deed. *Clark* v. *Akers*, 16 Kan., 166.

Under the Osage treaty of January 21, 1867, the deed of the reservee, when approved by the Secretary of the Interior related back to the date of selection, and was conclusive as against any rights to the land which did not exist at the date of selection. *Lowusberry* v. *Rakestraw*, 14 Kan., 151.

A sale or conveyance of land reserved under this treaty to the Indians, to any one except a member of the tribe or the United States, is prohibited and void. *Pennock* v. *Monroe*, 5 Kan., 578.

A levy and sale of the land under execution, reserved by the Wyandotte treaty, to an orphan reservee even after he becomes of age, was void, and the ratification of such sale by the Secretary of the Interior could not make it valid. *Frederick* v. *Gray*, 12 Kan., 518.

A deed by a reservee conveying land reserved under the Pottawatomie treaty, could not operate as a conveyance to pass the title to the land, until approved by the President; but after approval the deed took effect from its date. *Ashley* v. *Eberts*, 22 Ind., 55.

The approval of the President was not necessary to the validity of the

deed of a guardian for the minor heirs of a deceased reservee. *Dequindre* v. *Williams*, 31 Ind., 444; *Johns* v. *De Rome*, 5 Blackf., 421.

Under the Cherokee treaty of July 8, 1817, a lease or sale of the land reserved is void, and the act of May 29, 1830, relinquishing the right of the United States to the land, and vesting the title in the reservees, does not validate such lease or sale. *Kennedy* v. *McCartney*, 4 Porter, (Ala.), 141.

The land in question was within the reserve set apart for the permanent homes of the Chippewas, by treaty of February 22, 1855. The reserve was ceded to the United States by treaty of May 7, 1864, but this tract was expressly excepted from the cession. *Held*, That it retained its original character as an Indian reservation, over which the jurisdiction of the State, for civil purposes at least, did not extend, and that the estate of the deceased reservee cannot be administered upon by the State courts. *U. S. ex rel.* v. *Shanks*, 15 Minn., 369.

WALKER *v.* HENSHAW.

December Term, 1872.—16 Wallace, 436.

Prior to the 9th of July, 1858, when the President set apart the surplus of land which remained after the Shawnee Indians had obtained their complement under the treaty of the United States with them, ratified November 2d, 1854, and opened such surplus to pre-emption and settlement, an Indian of the Wyandotte tribe could not locate "a float" held by him under the treaties of the United States made with his tribe October 5th, 1842, and 1st of March, 1855.

ERROR to the Supreme Court of Kansas; the case being thus:

Walker and others brought an action under the civil code of Kansas to try title to and get possession of a section of land in Douglas county, Kansas, being "parcel of the lands ceded to the United States by the Shawnee tribe of Indians, by treaty ratified November 2d, 1854, (10 Stat. at Large, 1056), and lying between the Missouri State line and a line parallel thereto, and west of the same thirty miles distant."

The condition of these lands, as gathered from the provisions of certain Indian treaties and the laws of Congress, was as follows:

By articles of convention, made between William Clarke, superintendent of Indian affairs, and the *Shawnees*, of November 7th, 1825, in exchange for their lands near Cape Girardeau, on the Mississippi, held under the authority of the Spanish government, the Shawnees had the right to select 1,600,000 acres of land (a tract

equal to fifty miles square) on the Kansas river, to be "laid off either south or north of that river, and west of the boundary of Missouri."

By act of Congress of May 28th, 1830, the President was authorized to make the exchange. (4 Stat. at Large, 412, § 2): and—

§3. "To assure the tribe or nation * * * * that the United States will forever secure and guarantee to them, their heirs or successors, the country so exchanged with them," and –

§6. "To cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance *from any other tribe or nation of Indians*, or from any other person or persons whatsoever."

By articles of agreement and convention of August 8th, 1831, the United States agreed to grant, by patent in fee simple, 100,000 acres of land, to be located under direction of the President, within the limits of the fifty miles square reserve, provided for by the said treaty of 1825. (7 Stat. at Large, 356, art. 2), and to guarantee that said lands—

"Shall never be within the bounds of any State or territory * * * * and cause said tribe to be protected * * * * against all interruption or disturbance *from any other tribe or nation of Indians*, or from any other person or persons whatever," (7 Stat. at Large, 357, art. 10.)

[This fifty miles square reserve was located so as to include the lands in question.]

These arrangements and this treaty, the reader will observe, were with the *Shawnee* Indians: and thus things with that tribe and the United States remained A. D. 1842. On the 17th of March, in the year just named, a treaty was concluded between the *Wyandotte* Indians and the United States. (11 Stat. at Large, 583.) The 14th article of it was thus:

"The United States *agree to grant* by patent in fee simple, to each of the following named persons [Irwin Long among others] and their heirs, all of whom are Wyandottes, one section of land * * * * * * * * out of any lands west of the Mississippi [afterwards changed by amendment to Missouri] river, *set apart* for Indian use, *not already claimed or occupied by any person or tribe*. The lands hereby granted to be selected by the *grantees*, * * * * * *but never to be conveyed* by them, or their heirs, without the permission of the President of the United States."

We now come back to the *Shawnees*. The 1,500,000 acres of land granted to them by the treaty of 1825, subject to the provisions of the treaty of August 8th, 1831, including the lands in question, remained the property of the Shawnees until November 2d, 1854, (10 Stat. at Large, 1053.) A new treaty was then ratified

between them and the United States, by which the Shawnees ceded to the United States this 1,600,000 acres, and the United States ceded back to the Shawnees 200,000 thereof, "to be selected between the Missouri State line and a line parallel thereto, and west of the same, thirty miles distant." *including the lands in question.*

Out of these 200,000 acres, east of the thirty mile line, were to be carved certain head rights, and set off certain tracts to be occupied by Shawnees in common and for the protection of certain absentees; the residue was to be—

"Set apart in one body of land, in compact form, under the direction of the President of the United States, and all such Shawnees as return to and unite with the tribe within *five* years from the proclamation of this treaty (this gave until November 2, 1859) shall be entitled to the same quantity of land" as their brethren, &c., * * * "and whatever portion of said surplus remains unassigned, *after the expiration of said five years*, shall be sold as hereinafter provided," &c., the selections to conform to the legal subdivisions of the survey provided for in article 5.

The fifth article also—

"No *white person or citizen* shall be permitted to *make locations or settlements* within the thirty-mile limits until after all of the lands shall have been *surveyed*, and the Shawnees shall have made their selections and locations, *and the President shall have set apart the surplus.*"

On the 22d July, 1854, Congress passed an act extending the pre-emption laws over "all the lands to which the Indian title has been, or shall be extinguished" within the Territories of Nebraska and Kansas. (10 Stat. at Large, 309.)

We now pass back again to the Wyandottes, with whom the treaty had been made October 5th, 1842. By a new treaty, now made March 1st, 1855, it was thus provided in a tenth article:

"That each of the individuals to whom reservations were granted by the fourteenth article of the treaty of March 17th, 1842, or their heirs or legal representatives, shall be permitted to *select* and *locate* said reservations on any *government* lands west of the States of Missouri and Iowa, *subject to pre-emption and settlement*, said reservations to be patented by the United States in the name of the reservees as soon at practicable after the selections are made; and the reservees, their heirs or *proper* representatives, shall have the unrestricted right to sell and convey the same whenever they may think proper."

The lands in question were first opened for settlement, pre-emption, and sale on the 9th day of July, 1858.

So far as to the treaties and the date of opening of these lands to pre-emption, &c. Now as to the facts of this particular case.

The plaintiffs claimed under Irwin Long, the Wyandotte Indian mentioned in the treaty of 1842, who held a patent from the United States. In support of this title it appeared that on the 8th day of May, 1857, one Stover, a white man, as agent for Long, filed in the office of the surveyor general of Kansas and Nebraska a written notice that as such agent of Long, he had on that day selected and located a reserve of land to which Long was entitled, *in pursuance of the two treaties made by the United States with the Wyandottes on the 5th of October*, 1842, *and the 1st of March*, 1855. On this proceeding a patent—this being the patent under which the plaintiffs claimed—purporting to convey the lands in pursuance of the said treaties, was issued and duly delivered.

The defendants claimed title by virtue of a pre-emption settlement of the 28th July, 1858. In support of this title it appeared that in February, 1857, one Whaley, being personally qualified, entered upon and made settlement in person, and commenced to improve with intent to pre-empt and purchase the land: that after making such settlement, and within thirty days thereafter, he went to the proper local land office with intent to file notice of his said settlement and intention to pre-empt, and offered to make such filing: but that the register of the land office refused to allow such filing, on the ground that the said land was not pre-emptable: that in April of the same year he went to the same office and made the same offer, which was refused by the register on the same grounds: that on the 30th day of July, 1858, he duly filed in the office of the register of the said land office a notice of his settlement on said land, and of his intention to pre-empt the same, dating the time of his settlement July 28th, 1858: *that on the 5th day of May*, 1859, he purchased the said land and paid for the same, and took the usual certificate of such purchase and payment: that on the 10th day of August, 1860, the said pre-emption and purchase was approved by the Commissioner of the General Land Office of the United States, and the register of the local land office was duly notified, by letter of said commissioner, of such approval.

That afterward the said Whaley applied to the register of said local land office, at his office, for a patent from the United States to him for said land, and was informed by said register that said

patent had been sent from Washington to said office, and afterwards recalled.

As already said, the land in question was first opened for settlement, pre-emption, and sale, on the 9th of July, 1858.

The suit being referred to a referee to try the action, he found as matter of law that up to the 9th of July, 1858, when, as just mentioned, the lands were first opened for settlement, pre-emption, and sale, and indeed up to May 5th, 1859, when Whaley made his payment and purchase, neither plaintiffs nor defendants had acquired any title; but that by the purchase and payment then made, an equitable title was vested in Whaley.

He accordingly found that the defendants were entitled to judgment, and found further that the plaintiffs should convey the title to the defendants, &c.

This decision was declared to be right by the Supreme Court of the State, and the case was now brought here for review.

Messrs. W. T. Otto and *J. P. Usher* for the plaintiffs in error.

Messrs. Thacher and *Banks contra.*

MR. JUSTICE DAVIS delivered the opinion of the court.

If the land in controversy was subject to the location of the Wyandotte float before it was proclaimed open to pre-emption and settlement, the title of the plaintiffs cannot be divested by any supposed equity growing out of the pre-emption of the defendants. If on the contrary, neither the plaintiff's grantor nor the defendants could take any steps towards acquiring title to the land until the 9th day of July, 1858, when it was first open to pre-emption settlement, the defendants having since that date complied with all the requirements of the pre-emption law, and obtained the usual certificates of purchase, and grantor of the plaintiffs having taken no action on the subject after the 8th day of May, 1857, are equitably entitled to the land, and the legal title enures to their benefit.

Whether the one or the other of these categories be true, depends on the construction to be given several Indian treaties, which we will proceed to notice.

By the fourteenth article of the treaty with the Wyandotte nation of Indians, ratified on the 5th day of October, 1842 (11 Stat. at Large, 583), the United States agreed to grant to each of several named persons (among the number Irwin Long), Wyandottes by blood or adoption, a section of land out of any lands west of the

Missouri river, set apart for Indian use, not already claimed or occupied by any person or tribe. The privilege of selecting the lands was conceded to the grantees, but the power of alienation was denied them, except with the permission of the President.

Another treaty was made with this same tribe of Indians on the 1st day of March, 1855 (10 Stats. at Large, 1,162), which conferred on the reservees, under the treaty of 1842, the right to select and locate their lands on any government lands west of the States of Missouri and Iowa, subject to pre-emption and settlement, and the restriction upon alienation imposed in the first treaty was withdrawn, except as to certain incompetent persons. The reserve of Long, through whom the plaintiffs claim title, was located upon the land in dispute, in May, 1857, and the question is, was the location authorized by either of those treaties? It is contended that the lands were not, at the time of the attempted location, subject to be taken under the Long float, because they were then claimed or occupied by the Shawnee Indians, and this presents the most important subject of inquiry.

It had been, for a long time prior to the Wyandotte treaty of 1842, the well-defined policy of Congress to remove the Indians from organized States, and in execution of this policy, territory supposed at the time to be too remote for white settlement, was set apart exclusively for the use of Indian tribes. It was this policy that dictated the removal of the Shawnees from Missouri and Ohio, in 1825 and 1831, to a tract of country in Kansas of large area, ceded to them by the United States, and embracing the lands in controversy. They held this large tract of land under the protection of treaties and acts of Congress, from 1825 to 1854, when the rapid decrease in their numbers, and the encroachments of the white population, induced the government to conclude another treaty with them, essentially lessening their territorial limits. During this time they were, by express stipulation, assured of protection, not only against interruption or disturbance from any other tribe of Indians, but from everybody else. In recognition of this guarantee, the reservees, under the Wyandotte treaty of 1842, although in pursuance of the policy of the government, confined in their selections to lands west of the Missouri river set apart for Indian use, could not appropriate the lands already claimed or occupied by any person or tribe.

It is apparent, therefore, that Long had no right to locate his

float on the land in dispute, from 1842 to 1854, because during all this time it was claimed or occupied by the Shawnees.

Did the treaty of 1854 with them so alter the condition of things as to render valid the location of this float in 1857? By this treaty the Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825, with the exception of two hundred thousand acres reserved as homes for the Shawnee people, to be selected within certain defined limits, which included the lands in dispute. It was contemplated that even this reservation might be more than the wants of this people required, on account of the paucity of their numbers and the limited quantity of land assigned to each individual member of the tribe. Accordingly, provision was made that the surplus which remained unassigned after the expiration of five years, unless sooner ascertained, should be sold by the government, and the proceeds appropriated to the use of the Indians.

During this time the privilege was conceded to the Shawnees of selecting their lands wherever they chose, within the limits of the reservation. Indeed, until this privilege was exhausted, the land, in any proper sense, belonged to them.

In surrendering the larger part of their immense possessions to relieve the government from the predicament in which it was placed by the advancing tide of white population, they did not part with any right in the lesser part reserved by them as long as the claim of any single member of the tribe, according to the terms of the treaty, was unsatisfied. If one person could acquire a right to any portion of the lands thus reserved, so could another, and in this way the privilege of free and unrestricted selection would be frittered away.

It needed no special provision to secure this freedom of choice, for without it the treaty could not be executed. By virtue of the treaty itself these lands were appropriated to a specific purpose, and whatever interfered with this accomplishment of the purpose was necessarily forbidden.

It is easy to see that the purpose for which the Shawnees retained in their own hands the entire reservation could not be effected, if an entry for location and settlement by any one else were permitted, for the part thus taken was subject at any moment of time to be chosen for the use and occupation of the Shawnees. In effect the retrocession by these Indians of the lands granted to them in 1825, was on the condition that they should be allowed

to select, within a limited time, out of two hundred thousand acres set apart for this purpose, a quantity of land equal to two hundred acres for each individual member of the tribe. The performance of this condition required, until this time expired, absolute non-interference by any outside party. On any other theory of interpretation these Indians, on account of their helpless state, could not have obtained the lands they desired. If these views be correct the exclusion, in section five, of white persons and citizens from making locations or settlements was not required by the necessities of the case. They were excluded without it. The clause was doubtless inserted out of superabundant caution, and to satisfy the misgivings of the Indians, who, from experience, had good reason to dread the encroachments of this class of people, notwithstanding treaty stipulations. This experience had given them no ground to apprehend interference from the Indians on account of the direct control exercised by the government over the affairs of all the Indians tribe.

If, however, the government had been able, without difficulty, to protect them against their own race, it had not, with every effort, been always able to hold in restraint the ceaseless activity of the white race. It was, therefore, natural that on this occasion the Shawnees should want, although wholly unnecessary, a positive stipulation against the unlawful intrusion upon their rights by our own citizens. Indeed, this very case affords an illustration of the quarter from which trouble has always arisen, for Stover, a white man, located the reserve, and it is a reasonable presumption, in the absence of any proof on the subject, that he was interested in the location. It is enough to say, without pursuing this branch of the case further, that we agree with the learned Supreme Court of Kansas, that the latter clause of the fifth article of the treaty "conferred no right or made no prohibition which the law would not raise on the treaty" without it.

If so, the location of Long's float, under the treaty of 1842, was an illegal act, because inconsistent with the existing rights of the Shawnees. These rights were in full force at the time of the attempted location, and remained in this condition until the proclamation of the President of the 9th of July, 1858, setting apart the surplus of lands which remained after the Shawnees had obtained their full complement and opening the lands thus segregated for pre-emption and settlement.

In no respect has the United States failed to discharge the obli-

gation incurred by the treaty of 1842, with the Wyandotte reservees. The Indian country to which they were invited to go had been defined by Congress (see. 4 Stat. at Large, 739, and acts extending the same), and they were told to locate their reserves anywhere within it, provided they did not encroach on the rights of others. This limitation was not only reasonable in itself, but essential to preserve the faith of the government in its several treaties with the different Indian tribes. Why thirteen years were suffered to pass without these reserves being located does not appear, but it is obvious in 1855 they had materially lessened in value, as before that time the limits of the Indian country, by legislation and treaty, had been very much restricted. This restriction imposed on the government the duty of making other provisions for these floating grants, and this duty was performed by the Wyandotte treaty of 1855. This treaty, among other things, allowed the reservees to locate their floats on any government lands west of the Missouri and Iowa, subject to pre-emption and settlement, and removed the restraint upon the power of alienation, imposed in the former treaty. This action of the government placed Long and the defendants, as to the lands in question, on precisely the same grounds. Neither party could acquire any right to them until they were thrown open to pre-emption and settlement, and both, as soon as this was done, were at liberty to take them up; Long, by means of his float, the defendants by reason of their qualifications as pre-emptors; and whoever moved in the matter first would have the better right.

It required, however, positive affirmative action after the lands weredeclared to be public lands before any title to them, legal or equitable, could be obtained, and all proceedings attempting to forestall the proclamation of the President were null and void, because in contravention of the treaty with the Shawnees. The defendants, not relying on their prior settlement in February, 1857, to protect them, took the proper steps after this proclamation to perfect their pre-emption, and have performed all the conditions to which they were subject by the law. They have therefore a complete equitable title to the land, and as the patent issued to Long was based on an unlawful entry, it ought to be transferred to the defendants.

There is, in our opinion, no error in the judgment of the Supreme Court of Kansas, and it is accordingly *Affirmed.*

BEST v. POLK.

October Term, 1873.—18 Wallace, 112.

1. The treaty of May 24th, 1834, with the Chickasaw Indians (7 Stat. at Large, 450), conferred title to the reservations contemplated by it, which was complete when the locations were made to identify them.[1]
2. A patent (as often decided before) is void which attempts to convey lands previously granted, reserved from sale, or appropriated.[2]
3. Reservees, under the treaty above named, are not obliged, in addition to proving that the locations were made by the proper officers, to prove also that the conditions on which these officers were authorized to act, had been observed by them.
4. Copies of records appertaining to the land office, certified by the register of the district where they are, are evidence in Mississippi.[3]
5. An officer commissioned to hold office during the term of four years from the 2d of March, 1845, is in office on the 2d of March, 1849. The word "from" excludes the day of date.

ERROR to the District Court for the Northern District of Mississippi, the case being this:

By virtue of a treaty made October 20th, 1832 (7 Stat. at Large, 381), the Chickasaw Nation of Indians, in the belief that it was better to seek a home west of the Mississippi, ceded their lands to the United States, who agreed to survey and sell them on the same terms and conditions as the other public lands, and to pay the proceeds to the nation. In order, however, that the people of the tribe should not be deprived of a home until they should have secured a country to remove to, they were allowed, after the survey, and before the first public sale of their lands, to select, out of the surveys, a reasonable settlement for each family, and to retain these selections as long as they were occupied. After this occupation ceased, the selected lands were to be sold and the proceeds paid to the nation.

On the 24th of May, 1834, a little more than a year after the date of the first treaty, another treaty (7 Stat. at Large, 450) was made with these Indians, essentially changing the provisions of the former one. These changes were made owing to the supposed inability of the Chickasaws to obtain a country within the territorial limits of the United States, adequate to their wants, and to the desire expressed by them to have, within their own direction and control, the means of taking care of themselves. Accordingly, they abandoned the idea of selecting, out of the surveys, lands for temporary occupation, and, in lieu thereof, reservations of a limited quantity were conceded to them. The

scheme embraced the whole tribe—heads of families, as well as all persons over twenty-one years of age, male and female, who did not occupy that relation. The sixth article of the treaty reserved a section of land to each of this latter class of Indians, a list of whom, within a reasonable time, seven chiefs (named in the treaty) were to make out and file with the agent. On this officer certifying that the list was believed to be accurate, the register and receiver were to cause the locations to be made.

In this state of things, the United States, on the 13th of March, 1847, reciting that one James Brown had paid, "according to the provisions of two several treaties with the Chickasaw Indians, dated October 20th, 1832, and May 24th, 1834," &c., for the section 23, in township 5, of range 11 west, in the district of lands subject to sale at Pontotoc, Mississippi, containing, &c., "according to the official plat of the survey returned into the general land office by the surveyor general, which said tract has been purchased to the said James Brown," granted the section of land described by the said Brown in fee.

Brown granted it to one Polk. Hereupon, a certain Best being in possession, Polk sued him in ejectment. The defendant set up that, prior to the issuing of the patent to Brown, the section had been located to an Indian named Bah-o-nah-tubby, of the Chickasaw Nation, under the terms of the second treaty, and that he held under the said Indian.

On the trial the defendant offered in evidence a paper certified by one A. J. Edmondson, styling himself register of the land office of the United States, at Pontotoc, Mississippi, to be a "true copy of the roll, number, reserves, and locations under the sixth article" of the treaty between the United States and Chickasaw Indians, &c., "and of the list of persons furnished by the Chickasaw agent to the register and receiver as Indians entitled to land under said article." The paper ran thus:

Reservations Under the Sixth Article of the Chickasaw Treaty.

No.	RESERVE.	S.	T.	R.	DATE.
774	Tah-pin-tah-umby.....	7	6	11 W.	June 17, 1839.
775	Chaw-caw-mubby.....	10	5	11 W.	June 17, 1839.
776	Bah-o-nah-tubby..	23	5	11 W.	June 17, 1839.

The certificate of Edmondson to this exhibit was dated March 2d, 1849, while the commission of Edmondson himself, which was produced and put in evidence by the other side, was dated on March 2d, also, four years previously; and appointed him register of the land office at Pontotoc, "during the term of four years, from the 2d day of March, 1845."

The plaintiff objected to the paper offered in evidence, upon the ground that it did not purport to be a copy of the record of the land office; that the certificate was not authorized by any act of Congress; that it stated facts and legal conclusions; that it did not show that the list was made by the person named in the articles of the treaty, or that the agent certified to its believed accuracy; that it was not founded on any order of survey, donation, pre-emption, or purchase; that it did not purport to be a copy of the plat of the general office; that it could not be set up to defeat a patent; that the present action being one of ejectment, the legal title alone was involved, and that such title could only pass by a patent; that a patent could not be impeached at law except for defects apparent on its face; that the treaties did not convey the title in fee to the Indian Bah-o-nah-tubby, for the section of land sued for, but that the title remained in the United States till it passed out by patent.

The court decided that the paper was incompetent, and verdict and judgment having been rendered for the plaintiff, the defendant brought the case here, assigning for error the exclusion of the paper.

Mr. T. J. D. Fuller, in support of the ruling below:

In addition to the reasons taken on the trial for the rejection of the paper—reasons here iterated and relied on—it may be urged:

1. That the contemplated reservees were unknown and uncertain persons till designated and fixed in a prescribed manner and on specific proofs. The certificate offered in evidence should have therefore shown, in addition to what it did show (if it showed anything), that a list including Bah-o-nah-tubby was furnished by the "seven chiefs," in accordance with the sixth article of the treaty, to the agent, and that he certified to the receiver and register that he believed it accurate.

2. The paper offered was not authenticated in the manner prescribed by the statute. It should have been certified by the Com-

missioner of the Land Office, under the seal of the Department of the Interior, accompanied with the survey, maps, and reservations marked thereon, as they must be if the record exists. (See act of January 23d, 1823, 3 Stat. at Large, 721; 10 *Id.*, 297, and Brightly's Digest, 267, and foot-notes.)

3. The paper was inadmissible, because the officer certifying, and at the time he certified, was not in office. The day of the date of his commission is to be included within the computation of the four years. His office, or term of office, expired on the night of March 1st, 1849. And such is understood to be the practice and holding of the government. It is in analogy to the rule of law for computing time under the Statute of Limitations.

4. The paper, if competent for any purpose, could be so for one purpose only, and that was to disprove seizin of the plaintiff; but the defendant offered no evidence to connect himself with the alleged outstanding title.

Mr. J. W. C. Watson contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

In order to carry out in good faith Indian treaties, effect must be given to the intention of the parties to them, and from the different provisions of the treaties which are applicable to this case no well-founded doubt can exist of the proper construction to give to the sixth article. The cession in the first treaty contemplated the ultimate abandonment of the lands by the Indians. This treaty did not prove satisfactory, and the Indians asked and the United States conceded to them a limited quantity of land for a permanent home. This object could not be obtained if it were meant to give only an equitable title to the Indians. Such a title would soon become complicated by the encroachments of the white race; and that the Indians supposed they were providing for a good title to their "reservations" is manifest enough, because they declare in the second treaty that they wish to have the management of their affairs in their own hands.

This disposition, which was natural under the circumstances, the United States yielded to, and agreed, when the body of the lands were surveyed, to reserve from sale certain limited portions on which the reservations should be located. This was done in obedience to a just policy; for it would have been wrong, considering the dependent state of these Indians, to hold them to their original engagement. The United States could not afford

to do this, and therefore willingly consented to recede to the Indians enough lands for their wants. Can it be doubted that it was the intention of both parties to the treaty to clothe the reservees with the full title? If it were not so there would have been some words of limitation indicating a contrary intention. Instead of this there is nothing to show that a further grant or any additional evidence of title were contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them. This was the view taken of this subject by the highest court of Mississippi, soon after this treaty went into operation, in litigations which arose between the white race and the Indians themselves concerning the effect to be given to these reservations. (*Wray* v. *Doe*, 10 Smedes & Marshall, 461; *Newman* v. *Doe*, 4 Howard (Mississippi), 555; *Niles et al.* v. *Anderson et al.*, 5 *Id.*, 365; *Coleman* v. *Doe*, 4 Smedes & Marshall, 46.) In all these cases the Indian reservee was held to have preference over the subsequent patentee, on the ground that the United States had parted with the title by the treaty. These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bona fide* acquired.

It has been repeatedly held by this court that a patent is void which attempts to convey lands that have been "previously granted, reserved from sale, or appropriated." (*Stoddard* v. *Chambers*, 2 Howard, 284; *United States* v. *Arredondo*, 6 Peters, 728; *Reichart* v. *Felps*, 6 Wallace, 160.) "It would be a dangerous doctrine" (say the court in *New Orleans* v. *United States*, 10 Peters, 731), "to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be be contraverted; but if the thing granted was not in the grantor no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative."

If, therefore, the location of the land in controversy was properly made, the legal title to it was consummated, and the subse-

quent patent was unauthorized. And this brings us to the consideration of the question whether the evidence on the subject of the location ought to have been received by the court.

This evidence consists of the certificate of the register of the land office at Pontotoc that the reserve of a Chickasaw Indian (naming him) was located on the disputed section in June, 1839, under the provisions of the sixth article of the Chickasaw treaty, and a copy of the roll, number, reserve, and location is given, showing this to be the case. It is insisted that this certificate did not go far enough: that it ought to have shown that a list including this Indian was furnished by the seven chiefs to the agent, and that the agent certified to the register and receiver prior to the location that he believed the list to be accurate. If this were so no presumption could arise that local land officers charged with the performance of a duty had discharged it in conformity with law.

It would be a hard rule to hold that the reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the proper officers, but that the conditions on which these officers were authorized to act had been observed by them. Such a rule would impose a burden upon the reservees not contemplated by the treaty, and, of necessity, leave their titles in on unsettled state. The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested, and the right to it perfect—as much so as if the grant had been directly executed to the reservee. It has been frequently held by this court that a grant raises a presumption that the incipient steps required to give it validity have been taken. (*Polk's Lessee* v. *Wendell*, 5 Wheaton, 293; *Bagnell* v. *Broderick*, 13 Peters, 436.)

The grant, in this case, was complete when the location was made, and the location is, in itself, evidence that the directions of the treaty on the subject we observed, and it cannot be presumed that the officers empowered to make the location violated their duty. Even if the agent neglected to annex a proper certificate to the roll of Indians entitled to the reservations, it is difficult to see how the Indians could be prejudiced by this neglect. We conclude, therefore, that the certificate of the register was competent evidence, and if the locations were not as there stated, it is easy for the plaintiff below to show that fact. The same effect was given to a similar certificate of this same officer, by the High

Court of Errors and Appeals of Mississippi, as early as 1848, in an action of ejectment brought by a Chickasaw Indian, for a tract of land claimed by him in virtue of a location made in his behalf as a reservee, against a party claiming by patent subsequent in date to the location of his reservation. And this decision was reaffirmed by the same court in 1854, in the case of another Indian suing for his land under similar circumstances. *Wray* v. *Doe*, 10 Smedes & Marshall, 452; *Hardin* v. *Ho-yo-ho-nubby's Lessee*, 27 Mississippi, 567.

It must have been supposed at the time by the losing parties that these decisions were correct, or else the opinion of this court would have been asked on the point involved. After such a length of acquiesence, it would produce great mischief to hold this evidence to be incompetent.

It is objected that the paper offered in evidence should have been certified by the Commissioner of the General Land Office; but this was not necessary, for copies of records appertaining to the land office, certified by the register, are evidence in Mississippi, and similar statutes exist in nearly all the western and southwestern States. (See Revised Code of Mississippi.)

Another objection is taken to the certificate of Edmondson, on the ground that when it was given his term of office had expired. This objection cannot be sustained, for the certificate bears date the 2d March, 1849, and he was commissioned to hold the office of register "during the term of four years from the 2d day of March, 1845." The word "from" always excludes the day of date. (See 1 Parsons on Notes and Bills, 385, and the authorities therein cited.)

It is argued that in ejectment a stranger to the outstanding title cannot invoke it to defeat the action. Whether this be so or not depends on the laws of the State; but the point does not arise in this case, for there was no opportunity for the defendant to connect himself with the Indian title after the court refused to let the evidence on the subject of this title go to the jury.

The decision respecting this evidence necessarily disposed of the case.

Judgment reversed, and a venire de novo awarded.

1. *Held* the same under the Pottawatomie treaty of August 29, 1821, *Godfrey* v. *Beardsley*, 2 McLean, 412; also under Chippewa treaty of September 24, 1819, *Stockton* v. *Williams*, 1 Douglas (Mich.), 546; *Dewey*

v. *Campau*, 4 Mich., 565; also under Choctaw treaty of September 27, 1830, *Land* v. *Land*, 1 Smedes & M. Ch. (Miss.), 158; *McAfee* v. *Keirn*, 7 Smedes & M., 780; and *Coteman* v. *Fish-ho-mah*, 4 Smedes & M., 40.

The supplementary treaty of July 1, 1835, with the Caddo Indians, reciting that a certain quantity of land had been granted by the tribe to certain persons, and stipulating that those persons should have their right to the said land reserved, for them and their heirs and assigns forever, to be laid off in the southeast corner of the lands ceded, gave a fee simple to the persons named, and their grantee has a perfect title. *United States* v. *Brooks*, 10 Howard, 442.

A treaty which reserves land to an Indian by metes and bounds may be used in evidence to the jury to prove title in the reservee. *Harris* v. *Barnett*, 4 Blackf. (Ind.), 369. But where the treaty provides that the land shall be located in a certain place, and should be granted to the reservee by patent, the treaty is not evidence of title. *Langlois* v. *Coffin*, 1 Ind., 378.

2. Also see *Preston* v. *Browder*, 1 Wheaton, 115; *Danforth's Lessee* v. *Thomas*, 1 Wheaton, 155; *Burton's Lessee* v. *Williams*, 3 Wheaton, 529; *Mills* v. *Stoddard*, 8 Howard, 345.

A patent may be valid as to part of the land, and void as to the part not authorized to be sold. *Danforth* v. *Wear*, 9 Wheaton, 673; *Patterson* v. *Jenks*, 2 Peters, 216; *Winn* v. *Patterson*, 9 Peters, 663; *Clark* v. *Smith*, 13 Peters, 195; *Rondell* v. *Fay*, 32 Cal., 354.

An entry, survey, and patent for land in the Virginia military district, before the Indian title was extinguished, are all void. *Chinn* v. *Darnett*, 4 McLean, 446.

A patent issued to "James Smith, administrator of Robert Smith, and to his heirs," on a location made by James Smith, administrator of Robert Smith, with a bounty land warrant, is not void on its face, because it improperly issued to the administrator and his heirs. Such patent vests the legal title in James Smith, and his conveyance, without the addition of administrator of Robert Smith, will pass the legal title to his grantee. *Bonds* v. *Hickman*, 29 Cal., 460.

Where the land had been reserved from sale by the swamp-land grant, a patent issued on a subsequent entry is void in a court of law. *Daniel* v. *Perris*, 50 Miss., 261; *Keeler* v. *Brickey*, 78 Ill., 133.

3. The opinions of the officers of the land department and Attorney General, offered in a deposition, cannot go to the jury as evidence of the law of the case. *Roberts* v. *Cooper*, 20 Howard, 467.

For other points on evidence, see *Hanrick* v. *Barton*, 16 Wallace, 166; *Hedrick* v. *Hughes*, 15 Wallace, 123.

The exemplifications of the books and records of the General Land Office are admissible on the general principles of evidence. *Seely* v. *Wells*, 53 Ill., 120.

A certificate of entry with an assignment thereon, filed in the General Land Office, becomes a part of the records of that office, and a copy of such certificate, with the assignment thereon, when certified to by the commissioner, is competent evidence. *Clark* v. *Hall*, 19 Mich., 356.

The seal of the General Land Office and signature of the commissioner, to copies of papers required by law to be deposited in that office, *prima facie* prove themselves. *Harris* v. *Barnett*, 4 Blackf. (Ind.), 369.

The certified list of lands granted to the State to aid in constructing the Illinois Central Railroad, approved by the commissioner and Secretary of the Interior, is evidence of title in the State. *Sawyer* v. *Cox*, 63 Ill., 130.

A copy of the list of approved swamp selections on file in the local land office, certified to by the register, is evidence of the selection and approval. *Fore* v. *Williams*, 35 Miss., 533.

Certified copies of the list of lands selected by the Wabash and Erie Canal on file in the office of the State secretary of State, are not evidence; they should be certified from the original list on file in the General Land Office. *Stauffer* v. *Stevenson*, 1 Ind., 115.

JAMES TURNER *v.* THE AMERICAN BAPTIST MISSIONARY UNION.

U. S. Circuit Court, District of Michigan.—June Term, 1852.
5 McLean, 344.

A State has no power over the public lands within its limits.

When the State of Michigan was admitted into the Union, it assented to a compact which inhibited the exercise of this power.

A treaty is the supreme law of the land only when the treaty-making power can carry it into effect.

A treaty which stipulates for the payment of money, undertakes to do that which the treaty-making power cannot do, therefore the treaty is not the supreme law of the land. To give it effect, the action of Congress is necessary.

And, in this action, the Representatives and Senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power.

A foreign power may be presumed to know the power of appropriating money belongs to Congress.

No act of any part of the government can be held to be a law which has not all the sanctions to make it law.

A reservation of land for a specific purpose, withdraws it from general location, and from pre-emption rights.[1]

Where, in a treaty, 160 acres of land was reserved to be sold, in order to pay over the proceeds of the sale to those entitled to them, is a withdrawal of the land from general appropriation. A bill is not multifarious where it does not unite titles which have no analogy to each other, whereby the defendant's litigation and costs are increased.

An injunction to stay an ejectment suit, until matters of equity can be examined, will not be allowed, unless judgment in the ejectment be entered.

Mr. Patterson for plaintiff.
Frazer & Davidson for defendants.

OPINION OF THE COURT.

This is a case in chancery, which involves several important questions: The power of the general government over the public lands, treaty-making power with the Indians, the powers of a State, and the effect of certain reservations under the pre-emption law, &c.

The complainant states that in July, 1836, he settled upon the land now claimed by him, and in the ensuing spring built a permanent residence, and has ever since continued to reside on the same. That, the 7th of July, 1838, the land was proclaimed, by the President, for sale, to take place 15th of October, 1838. On 12th of October, 1838, he proved his pre-emption claim, and tendered $200 for the entire quarter-section. The entire section 25, at the Falls of Grand river, in the State of Michigan, had been selected by the State of Michigan; 21st June, 1838, lot No. 2 was confirmed to the State of Michigan. The 9th Feb., 1842, a law of Michigan was passed, allowing Sibley to purchase lot No. 2: that he obtained a certificate of purchase, and Sibley conveyed to complainant a part of lot No. 2, which was a part of the 160 acres mentioned in the treaty.

This Indian treaty was held at Washington city, the 28th of March, 1836, in the 8th article of which it is declared: "The mission establishments upon the Grand river shall be appraised, and the value paid to the proper boards." This was amended by the Senate to read as follows: "The net proceeds of the sale of the one hundred and sixty acres of land upon the Grand river, upon which the missionary society have erected their buildings, shall be paid to the said society in lieu of the value of their improvements."

It was proved that the defendants, as a missionary society, had occupied the 160 acres for many years, had built a church and mission house, and had made other improvements on the tract. It was also proved that the Catholics had occupied the same tract, or a part of it, and had constructed a chapel and other improvements.

On this same tract the complainant had settled and made his

improvements. The defendants having commenced an action of ejectment, to recover possession of the land claimed by them, the complainant prayed for an injunction against the further prosecution of that suit, and that the court would establish his title, &c.

On the part of complainant it was contended that, on the establishment of the State government, Michigan, by virtue of her sovereignty, had a right to all the lands within her limits.

This argument is not now advanced for the first time. Several years ago it was broached in the Senate, and in some of the State legislatures, but it was received everywhere with less favor than its advocates anticipated. It proffered so rich a boon to the new States, it was expected that they would embrace it with enthusiasm, and hail its advocates as the distinguished friends of State rights. The argument grew less cogent by the lapse of time, as the public lands passed into the hands of individuals by purchase. Had it not been for this, no one can say that the policy would not have enlisted a powerful, if not successful party, in our political progress.

Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless. The State of Michigan can exercise no power whatever over the public lands within her limits. She is expressly prohibited from doing this by a compact agreed to in the admission of the State into the Union.

A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such.

As well might it be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money, is in itself a law.

And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding

the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

Without a law the President is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty, in fact, appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of Congress was passed.

Under the act of 23d June, 1836, five entire sections of land were authorized to be selected and located under the direction of the legislature of Michigan, in legal divisions of not less than one quarter-section, from any of the unappropriated lands belonging to the United States within the State, were granted to the State for the purpose of completing the public buildings of the said State, &c. By virtue of this law, under the direction of the legislature of the State, the tract of 160 acres in controversy was in part, located. This location is objected to on two grounds.

1. The land located amounted to less than a quarter-section, and the above act did not authorize the entry of less than a quarter.

2. That under the treaty the land had been previously appropriated.

Both of these grounds are fatal to the right of the State. Under the law, the State was bound to conform to its provision, and a less quantity than 160 acres could not be located. The other ground is clear. The part of the land entered had been specially appropriated by the treaty. The land itself was not appropriated, but its proceeds, which necessarily require a sale of the land, in the usual mode of selling public lands, by the government, at public auction, in order that the proceeds of the sale might be paid over to the proper persons. It was not, therefore, open to location by the agent of the State. The words of the act are sufficient to show this:

"Any unappropriated land belonging to the United States, could be taken, to satisfy the donation to the State. But in so far as the location interfered with the mission land, it was spe-

cially appropriated to be sold that the proceeds might be paid to the persons entitled to them."

The same objection applies to the pre-emption claim by the act of 1838, which continues the act of 1830. That act declares that its provisions should not apply to lands which had been reserved or otherwise appropriated.

It is contended that a treaty with Indian tribes, has not the same dignity or effect, as a treaty with a foreign and independent nation. This distinction is not authorized by the constitution. Since the commencement of the government, treaties have been made with the Indians, and the treaty-making power has been exercised in making them. They are treaties, within the meaning of the constitution, and, as such, are the supreme laws of the land.

The objection that the bill is multifarious, arises on the demurrer. But we think it is not sustainable. The decisions on this subject are contradictory and unsatisfactory. The common sense rule in such cases is, that an individual shall not be called to maintain his title, or shall not assert it, in connection with others, to which it has no analogy, and in the investigation of which, the cost and the complexity of the case will be increased.

It is a rule of this court, in practice, not to allow an injunction to stay a proceeding at law, until the matter in equity shall be investigated. In such cases the court require a judgment to be entered in the ejectment, as a condition to the allowance of an injunction. If this be not done, though the decision in chancery be favorable to the legal right, to gain the possession of the premises, a prosecution of the action at law may be necessary. To avoid delay in this respect, the rule has been observed.

The court overrule the demurrer, and enter a rule for answer.

1. General laws for the disposition of the public land do not embrace land directed to be sold in a special manner. *United States* v. *Gear*, 3 How., 120.

ALPHEUS H. PARKER AND E. O. F. HASTINGS *v.* GREEN DUFF, AMOS HENSHAW AND LUKE ROBINSON.

Supreme Court of California.—January Term, 1874.—47 California, 554.

Power of Registers and Receivers of Public Lands.—The registers and receivers of the United States land offices, in permitting entries of public lands to be made, must look only to acts of Congress, and to such regulations of the General Land Office as have been made in pursuance of law. They have no powers except such as are derived from these sources.

Power of Head of Land Department.—The head of the land department of the United States has no authority to direct or permit entries of land to be made in the local offices unless in cases authorized by some act of Congress.

Control of Land Department by Treaty-making Power.—The treaty-making power cannot confer upon the land department any authority nor enjoin upon it any duty in respect to the sale, conveyance, or disposal of the public lands of the United States, except with the consent of Congress.[1]

Selection of Public Lands and Patents Therefor under the Treaty-making Power.—If a treaty is made with a tribe of Indians, by which they relinquish to the United States their lands with certain reservations, and the treaty provides that the heads of families in the tribe shall each be entitled to eighty acres of land to be selected under the direction of the President, and to be secured by patents, the officers of the land department cannot issue scrip for land selected under the treaty outside of the ceded territory, nor can the President issue patents therefor in the absence of legislation by Congress authorizing it to be done.

Treaty with the Chippewas.—The treaty with the Chippewas of Lake Superior and the Mississippi, dated September 30, 1854, giving to each head of a family of the mixed bloods of the tribe eighty acres of land, to be selected by the President and patented, does not permit the selection of lands for such mixed bloods on the public domain outside of the territory ceded to the United States by the Indians in the treaty.

Chippewa Scrip and Patents Thereon.—Scrip issued for such lands selected outside the ceded territory is issued without authority of law, and patents issued therefor which show for what they were issued, are void on their face.

APPEAL from the District Court, Third Judicial District, County of Santa Clara.

Ejectment to recover lots one and two of section 15, T. 7 south, R. 1 west, Mount Diablo meridian. The complaint was in the usual form. The answer, after denying the allegations of the

complaint, set up by way of cross-complaint, and for the purpose of obtaining affirmative relief, the following facts:

That in January, 1864, one H. H. Warburton was in possession of the demanded premises, and remained in possession until December 24, 1868, when he sold the same for $2,900 to defendant, Luke Robinson, and delivered possession to Robinson, and that Robinson was a qualified pre-emptor, and the land was public land subject to pre-emption, and Robinson settled on it with the intention of pre-empting.

That the plat of the survey of the township was filed in the local land office November 7th, 1866, but was suspended by an order of the surveyor general of the United States until the tenth day of October, 1868, when it was restored, and that defendant Robinson, on the seventh day of January, 1869, filed his declaratory statement of pre-emption.

That November 4th, 1864, there was issued to Francoise Brunette by W. P. Dole, Commissioner of Indian Affairs, under and by virtue of the treaty of September 30th, 1854, between the United States and the Chippewas of Lake Superior (vol. 10, U. S. Statutes at Large, pages 1109 and following), a certificate, of which the following is a copy:

"*Examined, No.* 166, *C.*

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS, *November* 4, 1864.

"I hereby certify that Francoise Brunette, of ———, in the State of Minnesota, is one of the persons described in the provisions contained in the treaty of September 30, 1854, with the Chippewas of Lake Superior, and that the said Francoise Brunette is entitled to eighty acres of land as therein provided.

"It is hereby expressly declared that any sale, transfer, mortgage, assignment or pledge of this certificate, or of any right accruing under it, will not be recognized as valid by the United States, and that the patent for lands located by virtue thereof shall be issued directly to the above-named reservee, or his or her heirs, and shall in nowise enure to the benefit of any other person or persons; and the objects and purpose of this certificate is to identify the said above-named Francoise Brunette as one of the persons entitled to the benefit of the provisions of the seventh clause of the second article of the treaty aforesaid.

"Given under my hand and the seal of the Department of the Interior this day and year above written.

"W. P. DOLE, *Commissioner.*"

That on the 29th day of November, 1864, said Brunette made and appointed one L. L. Robinson his attorney in fact, with full power to locate the land mentioned in said certificate in any land office of the United States. That said Brunette, on the 29th day of November, 1864, sold to one John Y. Fraser the said certificate and the land mentioned therein, and gave no deed, but instead thereof gave to Fraser a paper purporting to be a power of attorney, authorizing said Fraser to sell and convey the land to be selected and patented by virtue of the certificate. That November 12, 1868, Robinson, as said attorney in fact of Brunette, and in the name of Brunette, made in the United States land office at San Francisco with said certificate a location of the demanded premises, but that the location was made at the request of and for the benefit of the plaintiffs, and Brunette knew nothing of the same, and never saw the land. That the register and receiver certified the location, and forwarded to Washington the certificate, with their endorsement that the same was located thereon, and the other documents referred to, and that the Commissioner of the General Land Office at Washington prepared a patent, and the President on the 10th day May, 1869, signed it.

That Fraser, on the 15th day of July, 1869, pretending to act under the power of attorney from Brunette, conveyed the land to the plaintiffs. The cross-complaint further averred that the other defendants were the tenants of the defendant Robinson. There was a prayer that the plaintiffs be compelled to convey to the defendant Robinson whatever title they had, and for general relief. The court below sustained a demurrer to this cross-complaint.

The following is the patent mentioned above:

"Examined. The United States of America. Certificate No. 166, C.

"*To all to whom these presents shall come, greeting:*

"Whereas, by the 7th clause of the second article of the treaty with the Chippewas of Lake Superior and the Mississippi, dated 30th September, 1854, it is provided that each head of a family or single person over twenty-one years of age, at the present time, of the mixed bloods belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them

under the direction of the President: and whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at San Francisco, No. 130, whereby it appears that Chippewa certificate No. 166, C. in the name of Francoise Brunette for eighty acres, issued by the Commissioner of Indian Affairs under the aforesaid treaty, has been located and surrendered by the said Francoise Brunette in full satisfaction for the lots numbered one and two of section fifteen, in township seven south, of range one west, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California, containing sixty acres according to the official plat of the public lands returned to the General Land Office by the surveyor general, which said tract has been located by the said Francoise Brunette.

"Now, know ye that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant unto the said Francoise Brunette, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Francoise Brunette, and to his heirs and assigns forever.

"In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States the ninety-third.

"By the President:

[Seal of General Land Office.] "U. S. GRANT."

On the trial the plaintiffs offered the patent in evidence. The defendant objected because the patent was void upon its face for want of authority in the officers issuing it; and that it appeared upon its face that it purported to convey a portion of the public domain of the United States, and that without the authority of an act of Congress of the United States, and therefore was void.

The court overruled the objections and admitted the patent in evidence.

The plaintiff recovered judgment, and the defendant appealed

from the judgment and from the order sustaining the demurrer to the cross-complaint.

Moore & Laine and S. F. Leib for the appellants, argued, that the patent was void on its face, because issued without authority of law, and cited *Patterson* v. *Winn*, 11 Wheat., 380; *Stoddard* v. *Chambers*, 2 Howard, U. S., 284; and *Minter* v. *Crommelin*, 18 Howard, U. S., 88; U. S. Stat. at Large, vol. 10, p. 1109. They also argued, that there was no authority for the acts of the land officers, and for the issuance of the patent, except the treaty, and that by a proper construction of the treaty no land could be selected outside the ceded territory.

They argued further, that the constitution of the United States, (art. 4, and sec. 3), conferred on Congress the power to make rules and regulations concerning the public domain, and that a treaty disposing of the public lands was in violation of the constitution, and cited Story on the Constitution, vol. 3, § 1322. *Wilcox* v. *Jackson*, 13 Pet., 516; *United States* v. *Fitzgerald*, 15 Pet., 421; *Easton* v. *Salisbury*, 21 How. U. S., 431; and *Frisbie* v. *Whitney*, 9 Wallace, 192.

George A. Nourse for respondents argued, that the power vested by the constitution in Congress to make rules and regulations in relation to the public domain was not exclusive, but might be exercised by the treaty-making power, as the power conferred on Congress and the clause making treaties the supreme law of the land, were concurrent grants, and that where a collision took place, the action of the treaty-making power, or of Congress, must give way according as one or the other first took action in the matter, and cited *Wilson* v. *Blackbird*, Creek Marsh, 2 Pet., 245; the License Leases, 5 How., U. S., 504; *Huston* v. *Moore*, 5 Wheat., 1, and No. 32, of the Federalist. That, as in this case, the treaty-making power had first alienated the land, the title had passed, and cited *Taylor* v. *Carlyle*, 20 How., U. S., 583, and *Pratt* v. *Northam*, 5 Mason, 95.

Moultrie & Lovell also for respondents.

The patent is not void because the President selected the land in controversy, outside of the ceded or Indian territory.

(Land Laws, Regulations, and Decisions, by Lester, vol. 2, pp. 371–373; Land Laws of the U. S., by Zabriskie, pp. 308–311.)

The head of the land department of the general government, has finally determined that it could select the lands outside the

ceded territory, and this court will not disturb the ruling, which for obvious reasons, ought to have the force of law in such matters. (*United States* v. *The Bank of the Metropolis*, 15 Pet., 491.)

"It is no objection to the right of the first grantee, that the land finally patented did not lie within the district ceded by the treaty which made the reservation, because the recitals in the patent are conclusive; at any rate, third parties have no right to impeach the patent for such a reason." (*Crews* v. *Burcham*, 1 Black, U. S., 352.)

By the court, CROCKETT, J.:

Though there are two records in these cases, brought up on separate appeals, they constitute in fact but one case; one of the appeals being from the judgment, and the other from the order sustaining the demurrer to and dismissing the cross-complaint.

It is unnecessary to decide whether this was an appealable order, and we shall treat the transcript filed on the last appeal as only an amendment of the transcript on the first appeal.

The most important question to be considered, and which we think is decisive of the case, is whether the patent to Brunette, under which the plaintiff claims, is void on its face.

The patent recites, that by the second article of the treaty with the Chippewas of Lake Superior and the Mississippi, dated 30th September, 1854, it is provided that "each head of a family or single person over twenty-one years of age, at the present time, of the mixed bloods belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President," and that there had been deposited in the General Land Office, a certificate of the register of the land office at San Francisco, whereby it appears that Chippewa certificate No. 166, C, in the name of Francoise Brunette for eighty acres, issued by the Commissioner of Indian Affairs, under the aforesaid treaty, has been located and surrendered by Brunette in full satisfaction for lots 1 and 2, (describing the premises in controversy in this action), which tract had been located by Brunette, and thereupon the patent proceeds to grant the land to him in the usual form. The patent is signed by the President, and is in due form. The treaty (10 Statutes at Large, p. 1109), after providing as quoted in the patent, also adds that the lands to be selected by the mixed bloods under the direction of the President, "shall be secured to them by patent in the usual form."

There appears to have been no act of Congress authorizing the scrip issued to these mixed blood Indians to be located on the public lands of the United States: and the argument for the defendants is, first, that under the third section of the fourth article of the constitution of the United States, Congress has the sole power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States," and it is claimed that, under the treaty-making power, the President and Senate had no authority to dispose of these lands without the consent of Congress.

Second, that if it be conceded that it is competent for the treaty-making power, under any circumstances, without the consent of Congress, to cede a portion of the public domain, nevertheless, if the treaty provides that a patent, in the usual form, shall issue for the ceded lands, the officers of the land department have no power to permit entries of the lands to be made in the local land offices, nor has the President authority to issue patents therefor unless empowered to do so by some act of Congress.

Under the views which we entertain in respect to the last proposition, it will be unnecessary to consider or determine the first.

In the exercise of its exclusive power under the constitution, Congress has established a land department for the management and sale of the public lands. This department is under the immediate supervision of the Commissioner of the General Land Office, subject to the supervisory control of the Secretary of the Interior; and the subordinate duties are performed by surveyors, registers, and receivers, in the several districts.

The duties of all these officers are prescribed by law, or by regulations having the force of law; and in permitting entries to be made in their respective offices, the register and receiver must look only to the act of Congress, and to such regulations of the general land office as have been made in pursuance of law. They have no powers except such as are derived from these sources; nor has the head of that department the authority to direct or permit entries to be made in the local offices, unless in cases authorized by some act of Congress. They are the mere creatures of statutory law, from which all their powers are derived.

The treaty-making power cannot confer upon the land department any authority, nor enjoin upon it any duty in respect to the sale, conveyance, or disposal of the public lands of the United States, except with the consent of Congress, which is the source

of all its powers. An entry in the local land office is void unless authorized by some act of Congress, and the President has no authority to issue patents, except in the cases provided by law. In *Stoddard* v. *Chambers* (2 How., 318), it was decided that a location "made on lands not liable to be thus appropriated, but expressly reserved," and a patent issued in accordance with the location, were void. In *Easton* v. *Salisbury*, 21 How., 431, the court says: "The President of the United States has no authority to issue patents for land, the sale of which is not authorized by law." In *United States* v. *Stone*, 2 Wall., 535, it was held that patents are void where the officer has no authority in law to issue them." In *Patterson* v. *Winn*, 11 Wheat., 388, it was announced as the settled doctrine of the court, "that, if a patent is absolutely void on its face, or the issuing thereof was without authority, or prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment." The same proposition is maintained in *Polk's Lessee* v. *Wendell*, 9 Cranch, 99; 5 Wheat., 303; *Ludigo* v. *Roland*, 2 Howard, 588; *Reichart* v. *Felps*, 6 Wall., 160, and numerous other cases. But the plaintiff contends, inasmuch as the constitution declares a treaty to be the supreme law of the land, first, that if the treaty, as in this case, provides that patents shall issue, this provision is as obligatory as any other. Second, that the acts of Congress establishing and regulating the land departments, prescribe the methods in which, and the officers by whom, patents are to be issued, and that no further legislation was necessary to carry the treaty into effect. In *Foster* v. *Neilson*, 2 Pet., 314, Chief Justice Marshall, in delivering the opinion of the court, said: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates, of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political and not the judicial department, and the legislature must execute the contract before it can become a rule of the court." In that case, the language of the treaty was, that "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, etc., shall be ratified and confirmed to the persons in possession, to the same extent that the same grants

would be valid if the territories had remained under the dominion of his Catholic Majesty."

The court held the treaty to create only a contract that the grants should be ratified and confirmed *in futuro;* and that until the legislative department, either directly, or through its agents appointed for that purpose, had ratified the grants, they had no standing in the courts.

In *Turner* v. *The American Baptist Mission Union*, 5 McLean, 344, it was provided by a treaty with a tribe of Indians that, "the net proceeds of the sale of the one hundred and sixty acres of land upon the Grand river, upon which the missionary society have erected their buildings, shall be paid to the said society in lieu of the value of their improvements." In discussing the question whether the treaty was self-executing, the court said: "A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties when the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be, the supreme law of the land, when the concurrence of Congress is necessary to give it effect, until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. * * * Without a law, the President is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty, in fact, appropriated the above tract of one hundred and sixty acres for a particular purpose, but to effectuate that purpose, an act of Congress was passed.

Tested by these rules, we think it is clear that the officers of the land department, in the absence of any legislation by Congress authorizing it to be done, had no authority to issue the Chippewa scrip, nor to permit entries to be made under it; and, consequently, that the patent was issued without authority of law.

The language of the treaty is, that the lands to be selected by mixed bloods, under the direction of the President, "shall be secured to them by patent in the usual form." This imports a contract that the government would thereafter cause the patents to be issued; and in principle, is not to be distinguished in this respect from the treaty considered in *Foster* v. *Wilson supra*, in which it was stipulated that certain grants "shall be ratified and

confirmed." In both cases the acts were to be performed *in futuro*, and in neither could there be a performance without the aid of the legislative department. So in *Turner* v. *The American Baptist Mission Union supra*, it was held that a stipulation in the treaty for the sale of certain lands and the application of the proceeds could not be carried into effect without an act of Congress. In the case of *Stockton* v. *Williams*, 1 Doug., 546, the Supreme Court of Michigan, considered the question now under discussion.

The facts were that by a treaty with the Chippewas there was reserved out of the ceded lands a tract of 640 acres for the use of a half-breed woman named Mokitchenoqua, "to be located at and near the general traverse of the Flint river, in such manner as the President of the United States may direct." The land department subsequently directed the register and receiver of the proper district to take proofs as to the identity of the person entitled to the reservation, and on ascertaining the fact, to issue to such person a proper certificate. A half-breed woman named Elizabeth Lyons, claimed that her Indian name was Mokitchenoqua, and that she was the reservee named in the treaty, made the proofs before the register and receiver, and secured the certificate. Several years later, another half-breed woman, named Nancy Crane, applied to the register and receiver for a certificate, claiming that her Indian name was Mokitchenoqua, and that she was the person for whom the reservation was made. On hearing the proofs, the register and receiver awarded the certificate to her; on which a patent was afterwards issued to her by the President. The Plaintiffs claimed under this title, and the defendants under the title of Elizabeth Lyons. The plaintiffs contended that the patent was conclusive of the rights of the parties; whilst the defendants claimed that the patent was void, because it was issued without authority of law. In considering this point, the court said: "But it may be said that the title is in the grantee of Mokitchenoqua, to whom the patent issued. But this presupposes a power on the part of the President to issue a patent for the land in question. Did this power exist? If it did its existence must be shown, for it will be hardly contended that under our form of government and system of laws respecting the public domain, it is competent for the President to issue a patent without the authority of law. The authority to issue patents is not inherent in the President, but belongs to Congress, who have the sole power to determine by whom and to whom, and upon what

conditions they shall be issued, and to declare their dignity and effect. The third article of the treaty of Saginaw does not provide that a patent shall issue, and no act of Congress has been produced authorizing the President to issue patents to the several reservees named in that article. We are bound, therefore, to suppose that the patent issued without any authority, derived either from the treaty or any act of Congress designed to carry into effect its provisions, and is, therefore, nugatory and void.

The court, it will be observed, lays some stress upon the fact that the treaty contains no provision authorizing a patent to issue. But whatever weight this may be entitled to, in respect to lands reserved within the ceded territory, the title to which did not pass to the United States under the treaty, it is entitled to none, in respect to other lands not included within the ceded territory, and which appear on the face of the patent not to have been so included. In respect to this latter class of lands, the President has no authority to issue patents, except such as is derived from some act of Congress.

No treaty can divest the legislative department of the "sole power to determine by whom, and to whom, and upon what conditions" patents shall issue, for portions of the public domain.

Whatever control the treaty-making power may exercise over lands reserved under a treaty of cession to the United States, it is clear that it cannot divest Congress of its exclusive power to determine in what cases patents shall issue for public lands not included in the ceded territory.

Thus far we have proceeded on the assumption that it was contemplated by the seventh subdivision of the second article of the treaty with the Chippewas, that each of the mixed bloods therein specified, should be entitled to eighty acres of land, to be selected by him, under the direction of the President, from any portion of the public domain of the United States, whether within or without the ceded territory. But we think this is not the proper interpertation of the treaty. By the second article there was set apart and withheld from sale six large bodies of land, for the use severally of six different bands of that tribe. Immediately following these reservations is the provision for the mixed bloods, by which each is to be entitled "to eighty acres of land to be selected by them, under the direction of the President, and which shall be secured to them by patent in the usual form." The third article, after providing for a survey of the reservations, authorizes the President

to "assign to each head of a family, or single person over twenty-one years of age, eighty acres of land for his or their separate use, and he may, at his descretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose." The provisions of the third article manifestly apply only to lands within the reservation, and there is nothing to justify the inference that the lands to be secured to the mixed bloods, were not to stand upon the same footing, with the single exception, that on account, probably, of their greater intelligence and of their supposed capacity to manage their own affairs, the land selected by them were to be immediately patented, and without any restriction as to the power of alienation. But there is nothing, we think, to warrant the conclusion, that they were authorized to select lands outside of the reservations and the ceded territory. We are, therefore, of opinion that the scrip on which the patent is founded, was issued without authority of law, and that the patent is void on its face.

This view of the case renders it unnecessary to decide the other questions discussed by counsel.

Judgment and order reversed, and cause remanded for a new trial.

NOTE.—In the case of *The Cherokee Tobacco* (11 Wall., 621), the court used the following language: "A treaty may supersede a prior act of Congress (*Foster & Elam* v. *Neilson*, 2 Pet., 314), and an act of Congress may supersede a prior treaty (*Taylor* v. *Morton*, 2 Curtis, 454; *The Clinton Bridge*, 1 Walworth, 155.")

1. In the case of *Holden* v. *Joy*, 17 Wall., 246, the court say: "Objection is made by the appellant that the treaty was inoperative to convey the neutral lands to the Cherokee nation, which may well be admitted, as none of its provisions purport *proprio vigore*, to make any such conveyance. Nothing of the kind is pretended, but the stipulation of the second article of the treaty is that the United States covenant and agree to convey to the said Indians and their descendants, by patent in fee simple, the described additional tract, meaning the tract known as the neutral lands; and the third article of the treaty stipulates that the lands ceded by the treaty, as well as those ceded by a prior treaty, shall all be included in one patent, to be executed to the Cherokee nation of Indians by the President, according to the provisions of the before-mentioned act of Congress. *Gaines* v. *Nicholson*, 9 How., 356; *Insurance Company* v. *Canter*, 1 Pet., 542.

"Suppose that is so, still it is insisted that the President and Senate,

in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States, without the consent of Congress, which cannot be admitted. *United States* v. *Brooks*, 10 How., 442; *Meigs* v. *McClung*, 9 Cranch, 11.

"On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political. *Wilson* v. *Wall*, 6 Wall., 89; *Insurance Co.* v. *Canter*, 1 Pet., 542; *Doe* v. *Wilson*, 23 How., 461; *Mitchell et al.* v. *United States*, 9 Pet., 749; *United States* v. *Brooks et al.*, 10 How., 460; *The Kansas Indians*, 5 Wall., 737; 2 Story on the Constitution, § 1508; *Foster et al.* v. *Neilson*, 2 Pet., 254; *Crews et al.* v. *Burcham*, 1 Black., 356; *Worcester* v. *Georgia*, 6 Pet., 562; *Blair* v. *Pathkiller*, 2 Yerger, 407; *Harris* v. *Barnett*, 4 Blackford, 369.

"Much reason exists in view of those authorities and others which might be referred to, for holding that the objection of the appellant is not well founded, but it is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid. *Insurance Co.* v. *Canter*, 1 Pet., 511; Lawrence's Wheaton, 48."

LARRIVIERE *v.* MADEGAN.

U. S. Circuit Court, District of Minnesota, 1870.—1 Dillon, 455.

Public Lands.—Ejectment.—Equitable Title.

1. The location of land with scrip, under and in compliance with the act of Congress of July 17, 1854, passed the fee out of the United States and was equivalent to a patent.
2. In ejectment, the defendant cannot, in the courts of the United States, set up an equitable title.

Before NELSON, J.:

The facts necessary to understand the questions of law decided, appear fully in the opinion of the court.

W. W. Phelps for the plaintiff.

S. L. Campbell for the defendant.

NELSON, District Judge:

This is an action of ejectment. The property involved is the northeast quarter of the southeast quarter of section nine (9), township one hundred and ten (110), west of range ten (10), containing forty acres of land, according to the government survey,

situated in what is known as the "Half-breed Tract," in the State of Minnesota.

The title is claimed by the plaintiff by virtue of a scrip location, under the act of Congress of July 17, 1854, and by the defendant, by virtue of a pre-emption entry conferred under the act of Congress of May 19, 1858, which is amendatory of the preceding act.

A special verdict was taken. It appears from this verdict that the plaintiff was a half-breed Sioux, and a beneficiary under the treaty of Prairie du Chien made in July, 1830.

The 9th article of this treaty reads as follows: "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the half-breeds of their nation the tract of land within the following limits, to wit:

"Beginning at a place called the Yarn, below and near the village of the Red Wing Chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty-two miles to a point opposite Beef or O-Beuf river; thence fifteen miles to the grand encampment opposite the river aforesaid. The United States agree to suffer said half-breeds to occupy said tract of country, they holding by the same title and in the same manner that other Indian titles are held." (7 Stats. at Large, 330.)

In July, 1834, Congress passed an act authorizing the President to exchange with half-breeds, beneficiaries of the forgoing treaty, for the tract of land described above, giving each of said half-breeds certificates or scrip for the same amount of land each would be entitled to in case a division of the reservation, *pro rata*, among the claimants, upon a full and complete relinquishment to the United States of all their right, title, and interest to the said tract of land. "Which said certificates or scrip" (in the language of the act) "may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breed or mixed bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements; provided," &c.

In accordance with the provisions of this act of Congress, the plaintiff, on the 27th of March, 1857, executed a relinquishment of his right, title, and interest in and to the said reservation, and received his certificate or scrip, and on the 11th day of August,

1857, at the Fairbault land office, located scrip No. 87, B, for forty acres, upon the property in dispute, fully complying with the instructions of the General Land Office.

On the 19th day of May, 1858, Congress passed an act amendatory of the act of July 17, 1854, as follows: "The act of July 17, 1854, is hereby amended so that the body of land known as the Half-breed Tract, lying on the west side of Lake Pepin and the Mississippi river, in the territory of Minnesota, and which is authorized to be surveyed by the said act of 1854, shall be subject to the operation of the laws regulating the sale and disposition of the public lands; and settlements heretofore made thereon are declared valid, so far as they do not conflict with settlement made by half-breeds; and that the settlers shall have the benefit of the pre-emption laws of the United States, any location of half-breed scrip thereon after date of the settlement notwithstanding; provided," &c. (11 Stats. at Large, 292.)

The defendants settled upon the land located by the plaintiff on the 8th day of October, 1855, and under the act of May 19, 1858, effected a *pre-emption entry* on the 2d day of June, 1859, of the southeast quarter of section nine (9), township one hundred and ten (110), range ten (10), west, which embraced the forty-acre tract aforesaid, and now claims a superior title to the plaintiff.

The principles involved in this case are not new. They have frequently engaged the attention of courts, and have been fully decided. The location of the land with the scrip, under the act of Congress of July 17, 1854, passed the fee out of the United States, and vested it in the plaintiff as grantee. The scrip and application became the "instruments of title," and conferred upon him the *legal* title as effectually as could have been done by the issuing of a patent.

The defendant sets up an *equitable* title only, to wit: a certificate of a pre-emption entry. In action at law, the legal title must prevail, and the equities of the parties cannot be inquired into. The location with the scrip, being, in my opinion, equivalent to a patent, gives a better title than the pre-emption entry. (See 13 Peters, 516; 20 Howard, 566; 11 *Ib.*, 568; 13 *Ib.*, 24; 2 Johns., 84, 222.)

These authorities settle this case, as no equitable title can be set up in ejectment in opposition to the legal estate.

Judgment upon the special verdict is, therefore, given for the plaintiff. *Judgment accordingly.*

NOTE.—This scrip cannot be located on land within an Indian reservation, and a patent issued on such location is void in a court of law. *Sharon* v. *Woodstrick*, 18 Minn., 354.

Neither can it be located on occupied public land without the consent of the occupant, but may be with his consent. *Thompson* v. *Myrick*, 20 Minn., 205.

The decisions of the land officers in disputes in locating land with this scrip will not be re-examined by the courts. *Monette* v. *Cratt*, 7 Minn., 234.

EDMUND RICE, plaintiff in error, *v.* THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

December Term, 1861.—1 Black, 360; 4 Miller, 502.

Construction of Congressional Railroad Grant.

1. An act of the territorial legislature incorporating a railroad company and granting it lands which Congress might thereafter grant to the territory to aid in building such a road, is not a binding and valid grant as against the State.
2. A grant of lands to a State or territory, for the purpose of building a railroad, which contains a provision "that no title shall vest in said territory, nor shall any patent issue for any part of the lands heretofore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted," is not a grant *in presenti*, and no title passes until the terms are complied with.
3. It is competent for Congress to repeal such an act absolutely before any road is built under it, and with the repeal falls all claims of the territory or any under her to the lands.

WRIT of error to the District Court for the District of Minnesota. The case is fully stated it the opinion.

Mr. Noyes and *Mr. Barbour* for plaintiffs.

Mr. Stevens for defendants.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the District of Minnesota, bringing up the record of a suit transferred into that court from the Supreme Court of the Territory.

According to the transcript, the suit was commenced by the present plaintiff on the first day of November, 1856, in the district court for the county of Dakota, before the territory was admitted as a State. It was an action of trespass; and the complaint

contained two counts, each describing a distinct tract of land as the close of the plaintiff. Both tracts, however, as described, comprised a certain part of township number one hundred and fourteen north, of range nineteen west, situate in the county where the suit was brought; and the several acts of trespass complained of were alleged, in each count, to have been committed on the twenty-fifth day of October, prior to the date of the writ.

Service was duly made upon the corporation defendants, and they appeared, and made answer to the suit. Whenever the answer to the suit extended beyond the mere denial of the allegations of the complaint, the law of the territory required that it should contain "a statement of the new matter constituting the defence or counter-claim;" and the defendants framed their answer, in this case, in conformity to that requirement.

Among other things, they admitted, in the answer, that the plaintiff claimed title to the premises under the United States, by purchase and entry, made on the first day of January, 1856; but averred that they were incorporated by the territorial legislature on the fourth day of March, 1854, and set up a prior title in themselves, under the provisions of their charter, and an act of Congress passed on the twenty-ninth day of June, in the same year.

Responding to that claim, the plaintiff replied, that the act of Congress referred to in the answer was repealed on the fourth day of August, of the same year in which it was passed.

To that replication the defendants demurred, showing for cause, that the act of Congress last named was void, and of no effect.

Judgment was entered for the plaintiff in the county court; and thereupon the defendants appealed to the supreme court of the territory, where the judgment of the county court was reversed; but no final judgment in the cause was ever entered in that court.

Pursuant to the act of Congress admitting the territory as a State, (11 Stat. at Large, 285), the record of the suit was then transferred to the District Court of the United States created by that act; and the latter court, on the nineteenth day of November, 1858, after supplying an omission in the record of the county court, entered a final judgment in favor of the defendants. Whereupon the plaintiff sued out a writ of error, and removed the case into this court.

Possession of the premises having been in the plaintiff at the time the supposed trespasses were committed, and the several acts of trespass complained of being admitted, the controversy must

turn upon the sufficiency of the title set up by the defendants. They were incorporated by the territorial legislature on the fourth day of March, 1854, as alleged in the answer. Their charter empowerd them, among other things, to survey, locate, and construct a railroad from the line of the State of Iowa to Lake Superior. Authority was also given to the company, in the charter, to secure, in the manner therein pointed out, a right of way for the contemplated railroad, two hundred feet in width, through the entire length of the described route.

For that purpose they might purchase the land of the owners, or might enter and take possession of the same upon paying proper compensation. And the charter also contained the following provision: All such lands * * * and privileges belonging, or which may hereafter belong, to the territory or future State of Minnesota, on and within said two hundred feet in width, are hereby granted to said corporation for said purposes, and for no other; and for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said territory, to aid in the construction of the said railroad, shall be, and the same are hereby, granted in fee simple, absolute, without any further act or deed. Provision was also made for such further deed or assurance of the transfer of the said property as said company might require, to vest in them a perfect title to the same; and to that end, the governor of the territory or future State was authorized and directed, "after the said grant of land shall have been made" to the territory by the United States, to execute and deliver to said company such further deed or assurance, in the name and in behalf of said territory or State, but upon such terms and conditions as may be prescribed by the act of Congress granting the same.

These references to the act of incorporation will be sufficient, in this connection, except to say, that the corporators named in the first section held a meeting within the time specified in the act, and voted to accept the charter, and gave notice of such acceptance, as therein required. They also chose a committee, to call future meetings for the organization of the company, and authorized the committee to open books and receive subscriptions for one million dollars of the capital stock.

Books of subscription were accordingly opened, under their direction, on the first day of May, 1854, and on the twentieth day of the same month subscriptions were made to the amount of two

hundred dollars, of which an installment of ten per cent. was duly paid by the subscribers. Congress, on the twenty-ninth day of June, 1854, passed the act entitled, "An act to aid the Territory of Minnesota in the construction of a railroad therein," which is the act of Congress referred to in the answer of the defendants. (10 Stat. at Large, p. 302.)

Assuming the allegations of the answer to be correct, subscriptions to the capitol stock of the company were made on the following day to the amount of one million of dollars, and an installment of ten per cent. upon each share so subscribed was duly paid to the committee. Having complied with the conditions of the charter in these particulars, the subscribers to the stock, in pursuance of previous notice given by the committee, met in the city of New York, on the first day of July in the same year, and completed the organization of the company, by the election of twelve directors, and such other officers as were necessary under their charter to effect that object.

Reference will now be made to the act of Congress set up in the replication of the plaintiff, in order that the precise state of facts, as they existed on the fourth day of August, 1854, when the repealing act was passed, may clearly appear.

By that act it was in effect provided, that the bill entitled "An act to aid the Territory of Minnesota in the construction of a railroad," passed on the twenty-ninth day of June, 1854, be, and the same is hereby repealed. (10 Stat. at Large, 575.) Repealed as the act was at the same session in which it was passed, the defendants had not then procured the amendments to their charter set up in the answer, nor had they then commenced to survey, locate, or construct the railroad therein authorized and described. They had completed the organization of the company under their original charter, at the time and in the manner already mentioned; but they had done nothing more which could have the remotest tendency to secure to them any right, title, or interest in the lands described in the complaint. One of the amendments to their charter, set up in the answer, was passed by the territorial legislature on the seventeenth day of February, 1855, and the other on the first day of March, 1856—more than a year and a half after the act of Congress in question had been repealed. Survey of the route and location of the railroad were made on the twentieth day of October, 1855; and the defendants admitted that the location included the parcels of land in controversy, and

that they went upon the same at the time alleged, and cut down and removed the trees from the track of the railroad, as alleged in the complaint.

Most of the facts here stated are drawn from the answer of the defendants; but, inasmuch as the pleadings resulted in demurrer, and the replication did not controvert the allegations of the answer, it must be assumed that the facts stated in the answer are correct.

Looking at the statement of the case, it is quite obvious that two questions are presented for decision of very considerable importance to the parties; but in our examination of them we shall reverse the order in which they were discussed at the bar. Briefly stated, the questions are as follows:

First. Whether the defendants acquired any right, title, or interest in the lands in controversy, by virtue of the provisions of their charter, as originally granted by the territorial legislature? and if not, then—

Secondly. Whether the territory, as a municipal corporation, by the true construction of the act of Congress set up in the answer, acquired, under it, any beneficial interest in the same, as contra-distinguished from a mere naked trust or power to dispose of the land, in the manner and for the use and purpose described in the act?

Argument is not necessary to show that those questions arise in the case, because, if the defendants acquired such a right, title, or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect. (*Terret* v. *Taylor* 9 Cran., 43; *Pawlet* v. *Clarke*, 9 Cran., 292.)

But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in the suit, because, if the legal effect of the act of Congress set up in the answer was to grant to the territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title; and the defendants, on the facts exhibited in the pleadings, although they did not acquire any title under their original charter, are, nevertheless, the rightful owners of the land, by virtue of the first amendment to the same, passed by the territorial legislature.

Unless both of the questions, therefore, are determined in the negative, the judgment of the court below must be affirmed. (*Fletcher* v. *Peck*, 6 Cran., 135.)

It is insisted by the defendants that their original charter, or that part of it already recited, operated as a valid grant to them of all the lands thereafter to be granted by Congress to the territory, and that the charter took effect as a grant, so as to vest the title in the company the moment the act of Congress was passed. But it is very clear that the proposition cannot be sustained, for the reason that both principle and authority forbid it. Grants made by a legislature are not warranties; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. Even the defendants admit that such was the rule at common law; but they contend that the rule is not applicable to this case. Several reasons are assigned for the distinction; but when rightly considered, they have no better foundation than the distinction itself, which obviously is without merit.

One of the reasons assigned is, that there is no common law of the United States, and consequently that the rule just mentioned is inapplicable to cases of this description. Jurisdiction, in common law cases, can never be exercised in the federal courts, unless conferred by an act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the constitution and the laws of Congress passed in pursuance thereof. Rules of decision, also, in cases within the thirty-fourth section of the judiciary act, are derived from the laws of the States, but in the construction of the laws of Congress the rules of the common law furnish the true guide; and the same remark applies in the construction of the statutes of a State, except in cases where the courts of the State have otherwise determined.

Able counsel submitted the same proposition in the case of *Charles River Bridge* v. *The Warren Bridge* (11 Pet., 545), but this court refused to adopt it, and in effect declared that the rules for the construction of statutes in the federal courts, both in civil and criminal cases, were borrowed from the common law. (See, also, 1 Story, Com. on Con., 3d ed., sec. 158.)

More direct adjudications, however, as to the validity of a grant where the title was not in the grantor at the time it was made are to be found in the earlier decisions of this court. Three times,

at least, the question has been expressly ruled, and in every instance in the same way. It was first presented in the case of *Polk's Lessee* v. *Wendell* (9 Cran., 99), and the court, MARSHALL, C. J., delivering the opinion, said that where the State had no title to the thing granted, or where the officer issuing it had no authority, the grant is absolutely void. Five years afterwards the same case was again brought before the court, and the same doctrine was affirmed in the same words. (*Polk's Lessee*, v. *Wendell*, 5 Wheat., 303.)

Notwithstanding those decisions, the question was presented to the court for the third time in the case of *Patterson* v. *Winn* (11 Wheat., 388); and on that occasion this court, after referring to the previous decisions, said, we may therefore assume as the settled doctrine of the court that if a patent is absolutely void upon its face, or the issuing thereof was without authority or prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law in an action of ejectment.

Assuming the rule to be a sound one, it is as applicable to a grant by a territory as to one made by a State, and the cases cited are decisive of the point. Our conclusion, therefore, on this branch of the case is, that the defendants acquired no right, title, or interest in the lands in controversy by virtue of their original charter.

2. Having disposed of the first question, we will proceed to the consideration of the second, which involves the inquiry whether any beneficial interest in the lands passed to the territory under the act of Congress set up in the answer. It is contended by the defendants, on this branch of the case, that the act of Congress in question was and is, *per se*, a grant *in presenti* to the territory of all the lands therein described, and that a present right, estate and interest in the same passed to the territory by the terms of the act. Reliance for the support of that proposition is chiefly placed upon the language of the first section. Omitting all such parts of it as are unimportant in this investigation, it provides: "That there shall be, and is hereby, granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad, * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within said territory, * * * which land shall be held by the Territory of Minnesota for the use and purpose aforesaid." Certain words in the clause are omitted, because they are not material to the present inquiry, and if produced would only serve to em-

barrass the investigation. Standing alone, the clause furnishes strong evidence to refute the proposition of the defendants that a beneficial interest passed *in presenti* to the territory, because it is distinctly provided that the lands granted shall be held by the territory for a declared use and purpose, evidently referring to the contemplated railroad, which, when completed, would be a public improvement of general interest. Resort to construction, however, on this point is wholly unnecessary, because it is expressly declared in the second proviso that the land hereby granted shall be exclusively applied in the construction of that road for which it was granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever. Beyond question, therefore, the lands were to be held by the territory only for the use and purpose of constructing the railroad described in the act, and they were to be applied to that purpose and no other.

Passing over the residue of the section, and also the second section, as unimportant in this inquiry, we come to the third, which shows even more decisively than the first that the interpretation assumed by the defendants cannot be sustained. Among other things it provides: "That the said lands hereby granted shall be subject to the disposal of any legislature thereof for the purpose aforesaid, and no other; nor shall they enure to the benefit of any company heretofore constituted and organized." Such disposal of the lands could not be made under the previous legislation of the territory, for the reasons already assigned in answer to the first proposition of the defendants, and we may now add another, which is, that no such authority was conferred in the act of Congress granting the land.

Whether we look at the language employed, or the purpose to be accomplished, or both combined, the conclusion is irresistible that it was by future action only that the legislature was authorized to dispose of the lands, even for the purpose therein described; and it is clear, irrespective of the prohibitions hereafter to be mentioned, that they could not be disposed of at all for any other purpose, nor in such manner that they would inure to the benefit of any company previously constituted and organized. Much reason exists to conclude that the latter prohibition, notwithstanding the fact that the defendants were not then organized, includes their company; but, in the view we have taken of the case, it is not necessary to decide that question at the present

time. Considered together, and irrespective of what follows, the first and third sections show that the lands were to be held by the territory for the declared use and purpose of constructing a specified public improvement; that they could not be disposed of at all, under any previous territorial legislation, nor for any other purpose than the one therein declared, nor to any company falling within the prohibition set forth in the third section; but, restricted as the authorities of the territory were by those limitations and prohibitions, their hands were still more closely tied by the provisions of the fourth section, which remain to be considered.

By the fourth section it is provided, "that the lands hereby granted to the said territory shall be disposed of by said territory only in the manner following—that is to say, no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted." Provision is also made for the issuing of a patent for a corresponding quantity of the lands when the Secretary of the Interior shall be satisfied that twenty miles are completed, and so on till the whole was finished; and it also provides that, if the road is not completed in ten years, no further sale shall be made, and the lands unsold shall revert to the United States. Comparing the several provisions together, it is not perceived that they are in any respect inconsistent, and certainly they all tend more or less strongly to the same conclusion. Certain lands are granted to the territory by the first section, to be held by it for a specified use and purpose, to wit, for the construction of a specified public improvement, and to be exclusively applied to that purpose, without any other restriction, except that the lands could be disposed of only as the work progressed. To carry out that purpose, the lands were declared by the third section to be subject to the future disposal of the territorial legislature, but that, in no event, should they inure to the benefit of any company previously constituted and organized. Neither of those sections contain any words which necessarily and absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly, the words employed are sufficient to have that effect; and, if not limited or restricted by the context, or other parts of the act, they would properly receive that construction; but the word grant is not a technical word, like the word enfeoff, and although, if used broadly, without limitation or restriction, it

would carry an estate or interest in the thing granted, still, it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor. Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute, and every part of it. (1 Kent's Com., 462.) Intention in such cases must govern, when it can be discovered: but, in the search for it, the whole statute must be regarded, and, if practicable, so expounded as to give effect to every part. That rule cannot be applied to this case, if it be admitted that a beneficial interest in the lands passed to the territory, because it is expressly provided by the fourth section of the act that no title shall vest in the Territory of Minnesota, nor shall any patent issue for any part of the lands, until a continuous length of twenty miles of the road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or as repugnant to the residue of the act, it is not possible, we think, to hold that the territory acquired a vested interest in the lands at the date of the act; and yet the fourth section contains the same words of grant as are to be found in the first and third, and no reason is perceived for holding that they are not used in the same sense. It is insisted by the defendants that the provision does not divest the grant of a present interest; that it only so qualifies the power of disposal that the territory cannot place the title beyond the operation of the condition specified in the grant. But they do not attempt to meet the difficulty that, by the express words of the act, the absolute title remained in the grantor, at least until twenty miles of the road were completed; nor do they even suggest by what process of reasoning the four words, "no title shall vest," can be shorn of their usual and ordinary signification, except to say that it would be doing great injustice to Congress to hold, notwithstanding the words of the first section, that no title passed to the grantee. Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together. On the other hand, if it be assumed that the territory acquired but a mere naked trust or power to dispose of the lands and carry out

the contemplated public improvements therein described, then the whole act is consistent and harmonious. (*Sims* v. *Lively*, 14 B. Mon., 432.)

These considerations tend so strongly to support the latter theory, that, even admitting the rule of construction assumed by the defendants that the grant must be construed most strongly against the grantor, we would still be constrained to hold that the second proposition submitted by them cannot be sustained. Legislative grants undoubtedly must be interpreted, if practicable, so as to affect the intention of the grantor; but if the words are ambiguous, the true rule of construction is the reverse of that assumed by the defendants, as is well settled by repeated decisions of this court. (*Charles River Bridge* v. *Warren Bridge*, 11 Peters, 544.)

Most of the cases bearing upon the point previously decided were very carefully reviewed on that occasion, and, consequently, it is not necessary to refer to them.

JUDGE STORY dissented from the views of the majorty of the judges, but the opinion of the court has since that time been constantly followed.

Later decisions of this court regard the rule as settled, that public grants are to be construed strictly, and that nothing passes by implication. That rule was applied in the case of *Mills et al.* v. *St. Clair County* (8 How., 581); and the court say the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and, therefore, should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if those do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of the *Richmond R. R.* v. *The Louisa R. R. Co.* (13 How., 81), must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is given by the act. (*Perrine* v. *Chesapeake Canal Co.*, 9 How., 192.)

Taken together, these several cases may be regarded as establishing the general doctrine, that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. (*Ohio Life and Trust Co.* v.

Debolt, 16 How., 435; *Com.* v. *The Erie and N. E. Railroad Co.*, 27 Penn., 339; *Stourbridge* v. *Wheeley*, 2 Barn. & Ad., 792; *Parker* v. *Great W. Railway Co.*, 7 M. & Gr., 253.)

That rule is plainly applicable to this case: and when applied, we think it is clear that the territory acquired nothing under the act of Congress set up in the answer but a mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein specified. Suppose it to be so, then it is not controverted that Congress could at any time repeal the act creating the trust, if not executed, and withdraw the power.

It is suggested, however, that the closing paragraph of the fourth section of the act is inconsistent with this view of the case, but we think not. Until the trust or power conferred was revoked by a repeal of the act, the lands were to be held by the territory for the use and purpose therein described, and, of course, were to be withdrawn from sale and entry under the pre-emption laws of the United States; and unless some period was fixed for the completion of the contemplated improvement, the delay might become the subject of complaint and embarrassment.

Ten years were accordingly allowed for that purpose, and if the work was not completed within that time, then the power of the territory to dispose of the lands was to cease, without any further action on the part of Congress. Such part of the lands as had been appropriated at the expiration of that period in execution of the work, were to be unaffected by that provision, but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted, and would again fall within the operation of the pre-emption laws.

Another suggestion is, that if the views of the plaintiff be adopted by the court, the same rule will apply to all the grants made by Congress to the States and other territories. Of course the suggestion is correct, if such other grants are made in the same terms, and are subject to the same limitations, restrictions, and prohibitions; but we have looked into that subject, and think it proper to say, that we see no foundation whatever for the suggestion. One of those grants came under the revision of the court in the case of *Lessieur et al.* v. *Price* (12 How., 76), and this court held, and we have no doubt correctly, that it was a present grant, and that the legislature was vested with full power to select and locate the land; but the case is so unlike the present that we

do not think it necessary to waste words in pointing out the distinction. Our conclusion upon the whole case is, that the act of Congress set up in the replication of the plaintiff is a valid law, and that the plaintiff is entitled to prevail in the suit.

MR. JUSTICE NELSON: I cannot agree to the judgment of the court in this case. The fundamental error of the opinion, I think, consists in not distinguishing between public and private legislative grants. The former concern government—are grants of political power, or of rights of property, connected with the exercise of political power for public purposes, in which no individual or corporate body can set up a vested interest, any more than a public functionary can set up a vested or private interest in his office. These are grants that may be altered, modified, or repealed, at the will of the legislature. Examples of this description of grants are the erection of towns and the incorporation of cities and villages, to which are delegated a portion of the political power of the government, to be administered within their limits and jurisdiction. Private legislative grants are subject to very different considerations. These are grants of rights of property, lands, or franchises, which may be made to individuals or corporate bodies, to towns, counties, States, or territories, and in which the grantee may have private beneficial interests. Examples are, the grant of lands to a town for the founding of a school, or of a church, or for the benefit of the poor of the town. The grantee in all such cases takes a beneficial interest in the grant, as the representative of the persons for whose benefit it is made. The town has an interest in the encouragement and support of schools, in the education of the people under its charge, in the support and maintenance of religion and religious institutions, and in the maintenance of the poor.

It is well settled in this court that grants of this description, when made by the legislature of a State, cannot be recalled; and we do not perceive any reason why the inviolability of the same class of grants should be less when made by the legislative power of the general government. Congress has made many grants of lands to States and territories for the same or kindred objects; for the founding of seminaries of learning; for building common roads, railroads, and canals; for reclaiming marsh lands, clearing obstructions from rivers, and other like objects.

Now, can it be said that the States and territories have no beneficial interest in those grants, or that they hold them as the mere

agents of the general government, or as naked trustees, and that they may be recalled at pleasure? I think not; certainly this is not the language of the court in respect to similar grants made by the States to public corporate bodies, such as town and cities. If this be the sound construction of this class of grants, and the one to be hereafter adopted and applied, I do not see that any effect is to be given to them until the lands granted have been sold and conveyed to purchasers.

They might take a valid title under the power of sale contained in the grant. But even then, the State or territory would derive no benefit from the grant after the sale, for if they hold the lands as public agents or naked trustees for the general government, as has been argued, the purchase-money would belong to it and might be reclaimed. Certainly, if the States and territories are the mere agents of the general government in the grants mentioned, the money would belong to the principal. Indeed, upon the doctrine contended for, I do not see how the sixteenth section in every township of the public lands, which is reserved to it for common schools, can be held by an indefeasable title. The use for which the grant is made in that instance is as much a public one as a grant of land to the town to build a canal, a turnpike, or railroad. And if a public use of this description deprives the town of any beneficial interest in the grant, then Congress may reclaim this sixteenth section, if unsold, and if sold, the purchase-money.

It has been strongly insisted, that the grant in question rests upon different principles from one in which the title to the lands has vested directly in the State or territory upon the passage of the law.

The 3d section provides that the lands hereby granted, &c., shall be subject to the disposal of the legislature of the territory for the purpose mentioned. The 4th section: The lands hereby granted, &c., shall be disposed of by the territory in the following manner: No title shall vest in said territory, nor shall any patent issue for any part of the land, until a continuous length of twenty miles of said road shall be completed; and when the Secretary of the Interior shall be satisfied that any twenty miles has been made, a patent shall issue for a quantity of land not exceeding one hundred and twenty sections, and so on, until the road is finished. And then ten years is given for the completion of the road.

This is a conditional grant, the condition particularly specified

in this fourth section. The condition is, the construction of twenty miles of the road, when one hundred and twenty sections are to be conveyed, and so on. The idea seems to be, that a conditional grant of this description may be revoked, but not one absolute in its terms. I am not aware of any such distinction. Certainly none is to be found in the common law. At common law or in equity a conditional grant is just as obligatory and indefeasable between the parties as one that is absolute. The grant carries with it not only the right, but the obligation, of the grantee to fulfill the condition; and until the failure to fulfill, the obligation is complete and the grant irrevocable.

It would be singular if the grantor, by availing himself of his own wrong in not waiting for the performance of the condition, could defeat the grant. Certainly it cannot be maintained, that the grant of land on condition is no grant until the condition is performed. And, if so, then why not as effectual and binding as an absolute grant, until default in the condition?

But there is another equally satisfactory answer to this ground for revoking the grant. The provision relied on, instead of furnishing evidence of any intent not to make a binding grant to the territory, leads to a contrary conclusion. Its object cannot be mistaken. It was to secure the application of the lands or the proceeds of them to the construction of the road. The act had before declared that the lands granted should be disposed of by the territory only as the work progressed, and in furtherance of this purpose, and to prevent any failure of it, provided that no title should vest or patent issue except from time to time as twenty miles of the road were completed. The argument that this provision indicates an intention on the part of Congress not to vest any beneficial interest in the territory in the lands, seems to me to be founded on a misapprehension of its purport and effect, which was simply to secure the accomplishment of the purposes of the grant.

Then, as to the difference between this grant and the numerous others of similar description, which it is said are subject to a different interpretation. I have examined several of them. The present one is a copy of the others *mutatis mutandis*, with one exception, and that is, instead of withholding the title to the lands till the twenty miles of the road are completed, the act forbids the sale of them till the condition is fulfilled. In the one instance, on satisfying the Secretary of the Interior that the twenty miles

have been constructed, the patent issues for the several sections specified; in the other, on satisfying him that the work has been done, he gives to the State or territory an authority to sell. The different provisions prescribed a different mode of securing the application of the lands to the purpose of the grant. This is the object and only object of each of them; and so far as this distinction goes, other grants of this description will be entitled to the benefit of it in case of any attempt to revoke them.

MR. JUSTICE WAYNE concurred in the dissent expressed by Mr. Justice Nelson, and added, as a further reason against the judgment of the court, that after this grant was made, more than a million of dollars was subscribed upon the faith of it to the railroad corporation.

MR. CHIEF JUSTICE TANEY, MR. JUSTICE GRIER, and MR. JUSTICE SWAYNE concurred in the opinion of Mr. Justice Clifford.

MR. JUSTICE CATRON did not sit in the case, being prevented by illness.

Judgment of the District Court reversed, and the cause remanded, with directions to overrule the demurrer filed by the defendants, issue a writ of inquiry to ascertain the plaintiff's damages, and after the return of the inquistion to enter judgment in his favor.

BAKER *v.* GEE.

December Term, 1863.—1 Wallace, 333.

1. Under the act of Congress of June 10, 1852, giving to the State of Missouri certain lands for railroad purposes, and the act of that State of September 20, 1852, accepting them and making provision in regard to them, the location of the lands was not fixed within the meaning of those acts by the mere location of the road; nor was it fixed until the railroad company caused a map of the road to be recorded in the office for recording deeds in the county where the land was situated, this sort of location being the kind required by the last act.
2. Where Congress gives land to a State for railroad purposes and for "no other," and the State granting the great bulk of them to such purposes allows settlements by pre-emption, where improvement and occupancy had been made on the lands prior to the date of the grant

by Congress and since continued, a purchaser from the railroad company of a part which the State had thus opened to pre-emption cannot object to the act of the State in having thus appropriated the part; the railroad company having, by formal acceptance of the bulk of the land under the same act which opened a fractional part to pre-emption, itself waived the right to do so. The United States as donor not objecting, nobody can object.

ERROR to the Circuit Court for the District of Missouri, the case being thus:

On the 10th June, 1852, Congress, by statute (10 Stat. at Large, 8), granted to the State of Missouri, to aid in building railroads from Hannibal to St. Joseph, the right of way through the public lands, and every alternate section designated by even numbers for six sections in width on each side of said roads. The statute directed that "a copy of the location of the roads, made under the direction of the legislature," should be forwarded to the proper local land offices and General Land Office at Washington, and that the lands thus given should be disposed of by the State for the purposes contemplated and for "no other."

On the 20th September of the same year the legislature of Missouri, by an act passed to accept the bounty of Congress (Session Acts, 1853, p. 15), required that the lands should be selected by the company under the direction of the governor, and that a copy of the "location of the road" should be certified to the local land offices and the General Land Office, in conformity with the act of Congress.

One section of the act (the fifth) gave a pre-emption right, at a price specified to settlers in actual occupancy, and who had improved the land occupied prior to the date of the gift, 10th June, 1852, by Congress, and to a certain extent on any land embraced in the grant, provided certain conditions were complied with, among which was that the party claiming pre-emption should, "within four months from the date of the location of the lands," file in the clerk's office of the circuit court of the county in which the land was situated a notice to the corporation of the claim. Another section obliged the company, within one year after their road should have been located, to file a map or profile of it, and a map of the land obtained for the use of the road, in the office of the Secretary of State, and have record made of the lands lying in each county in the office for recording deeds. The act and all the grants contained in it were to cease and be void unless the

acceptance of the company should within six months be filed in the office of the Secretary of State.

On the 23d November, 1857, a further act was passed making it the duty of the land agents of the road to file in the different counties through which their road pass a descriptive list of their lands.

The location of the line and route of the road was made on the 8th March, 1853, and the acceptance of the company duly filed with the Secretary of State on the 17th of the same month; but there was no proof of the time when the lands were actually located, nor any proof that descriptive lists were ever filed in the different counties until after the passage of the act of 1857.

In this state of the law and facts, one Gee having entered, in 1849, upon such part of one of the sections as the act of Missouri opened to pre-emption, and complied with the several conditions—such as occupancy, &c., prior to the gift by Congress—he instituted on the 3d of January, 1854, the proper proceedings to establish his right to purchase the land. He was denied, however, the right, on the ground that he had not made his claim in due season.

In the meantime one Baker purchased the land from the railroad company, and, setting up a title under that purchase, brought the present suit (ejectment) against Gee to recover the land which the latter claimed by right of pre-emption—a sort of title which in Missouri is recognized as sufficient to maintain or defend a suit in ejectment—the ground of Baker's claim being that Gee was obliged to show that he gave the notice required by the fifth section of the Missouri act of September 20, 1852, within four months of the location of the road, such location, as Baker contended, having been a location of the lands also; the whole region there having long been surveyed and subdivided by the United States, the sections designated by even numbers already laid down on the public maps, and the location of all the lands granted being made so soon as the railroad itself—which location was the rule and exponent of this also—was definitely fixed and marked on maps by the State. When this was done nothing additional, it was argued, could by intendment be necessary to give precision to the site of the lands, or to render their location more certain or more easy of ascertainment. The court below, however, was not of the opinion, and ruled "that the location of the land in question by the Hannibal and St. Joseph Railroad Company was

not complete, as regarded this defendant, until the said company caused a map thereof to be recorded in the office for recording deeds in which the said land is situated." Verdict and judgment were accordingly given in favor of the pre-emptor. On error here the correctness of the ruling just mentioned was one point in question; a second point raised and argued being the power of the State of Missouri, under the act of Congress which gave the lands for railroad purposes and for "no other," to open any part of it to pre-emption purchasers.

Mr. Gantt for the purchaser, Baker; and *Mr. Krum* for the pre-emptor, Gee.

MR. JUSTICE DAVIS, after stating the case, delivered the opinion of the court.

The practical question involved in this case is one of easy solution. It is this: "When did the right of pre-emption, under the fifth section of the act of September 20th, cease?" Manifestly, after four months from the location of the lands. It is argued that Gee's right was at an end if he did not prove his claim within four months from the location of the road. But such a construction would render valueless a wise provision, which the legislature of Missouri, in the exercise of an enlightened liberality, had conferred on a deserving class of people. It is not probable that a man whose necessities compelled him to claim the benefits of a pre-emption law, living in an interior county, away from the local land offices, would be correctly informed even of the location of the route of a railroad, and he certainly could not know what lands would belong to the company, unless he knew the exact line the road had taken. And the legislature, in order to render the provision for an actual settler a privilege, and not a delusion, directed the company, within one year after the line of the road was fixed, to have a map of their lands recorded in the different counties through which their road passed.

It is said that, owing to the accuracy of the government surveys, whenever the location of one of these land-grant roads is settled, it is an easy matter to ascertain the lands that would belong to it.

If the location of the road was always on section lines, it would not be difficult to select the even sections within six miles of each side of the road. But a railroad rarely runs on straight

lines. It makes short curves very often, and frequently runs diagonally across sections. It is well known that the general land office has encountered great difficulties in making correct selections of the lands which the bounty of Congress has bestowed on the States to aid in works of internal improvement. The selection is not merely mechanical, but requires skill and familiarity with land plats and surveys. On inquiry of the Commissioner of the General Land Office, we learn that, in this very case, the descriptive lists of the lands to which the road was entitled, were not approved and signed by the Secretary of the Interior until February 10th, 1854, which was more than a month after Gee filed his claim and accompanying proofs. And to make it more evident that it is not an easy task to make an accurate description of the lands really granted, we learn, further, that additional lists were afterwards certified to the State, in aid of said railroad, from time to time, and as late as the 15th of November, 1859.

It is contended that the legislature of Missouri had no power to grant the privileges of pre-emption. If this was a contest between the United States and the State of Missouri, the question of power would be a proper subject for examination. But the United States are not complaining, and no other party has a right to complain. If the act of the legislature imposed burdens, it nevertheless conferred great privileges, and, if any right to object existed, it was waived when the company filed their acceptance with the Secretary of State.

It follows that the court below committed no error in holding "that the location of the land in question, by the Hannibal and St. Joseph Railroad Company, was not complete, as regards this defendant, until said company caused a map thereof to be recorded in the office for recording deeds, in the county in which said land is situated." *Judgment affirmed, with costs.*

SCHULENBERG ET AL. *v.* HARRIMAN.

October Term, 1874.—21 Wallace, 44.

1. On the 3d of June, 1856, Congress passed an act entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State." That act grants to the State

for the purpose of aiding in the construction of a railroad between certain specified points, every alternate section of land, designated by an odd number, for six sections in width on each side of the road. The language of the first section of the act is, "*that there be, and is hereby granted* to the State of Wisconsin," the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the disposal* of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years, "no further sales shall be made, and the lands unsold shall *revert* to the United States." The State accepted the grant thus made, and assumed the execution of the trust. The route of the road was surveyed, and a map of its location was filed in the land office at Washington. The adjoining odd sections within the prescribed limits were then withdrawn from sale by the proper officers of the government, and certified lists thereof, approved by the Secretary of the Interior, were delivered to the State. Subsequently, on the 5th of May, 1864, Congress passed another act on the same subject, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin." By its first section additional land is granted to the State upon the same terms and conditions as those contained in the previous act, for the purpose of aiding in the construction of the road between certain of the points designated in the act of 1856, and the last act extends the time for completing the road for five years. This road has never been constructed, nor any part of it, and the time for its construction has not been extended since the act of 1864. Nor has Congress passed any act, nor have any judicial proceedings been taken to enforce a forfeiture of the grants for failure to construct the road within the period prescribed. *Held*—

1st. That the act of June 3d, 1856, and the first section of the act of May 5th, 1864, are grants *in presenti*, and passed the title to the odd sections designated to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

2d. That the lands granted have not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken either by legislation or judicial proceedings to enforce a forfeiture of the grants.

2. Unless there are clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title, where the United States are satisfied with them.

3. The provision in the act of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then

completed, is a condition subsequent, being in effect a provision that the grant to the extent of the lands unsold shall be void if the work designated be not done within that period.

4. No one can take advantage of the non-performance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the government.
5. The manner in which the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry, or its equivalent. If the grant be a public one, the right must be asserted by judicial proceedings authorized by law, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.
6. Where the title to land remains in the State, timber cut upon the land belongs to the State. Whilst the timber is standing it constitutes a part of the realty; being severed from the soil its character is changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.
7. Where logs cut from the lands of the State without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the State is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case held to be just in its operation and less severe than that which the common law would authorize.
8. Where, in an action of replevin, the complaint alleges property and right of possession in the plaintiffs, and the answer traverses directly these allegations, under the issue thus formed any evidence is admissible on the part of the defendant, which goes to show that the plaintiffs have neither property nor right of possession. Evidence of title in a stranger is admissible.

ERROR to the Circuit Court for the District of Minnesota.

Schulenberg and others brought replevin against Harriman for the possession of certain personal property, consisting of over sixteen hundred thousand feet of pine saw-logs, claimed by them, and alleged to be unlawfully detained from them by the defendant. The logs thus claimed were cut on lands embraced in an act of Congress, approved June 3, 1856, entitled "An act granting

public lands to the State of Wisconsin to aid in the construction of railroads in said State. (11 Stat. at Large. 20.) That act declares in its first section "that there be, *and is hereby granted* to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, * * * every alternate section of land designated by odd numbers, for six sections in width, on each side of the road," * * * and "that the land *hereby granted* shall be exclusively applied in the construction of the railroad for which it is granted and selected, and to no other purpose whatsoever." * * * In its third section the act provides "that the said lands *hereby granted* to said State shall be subject *to the disposal* of the legislature thereof for the purposes aforesaid and no other." And in its fourth section, that the lands "shall be disposed of by said State only in the manner following, that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road, may be sold: and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of said road are completed, then another like quantity of land hereby granted may be sold, and so on from time to time until said road is completed, and if said road is not completed within ten years no further sales shall be made, *and the lands unsold shall revert to the United States.*"

The State of Wisconsin, by act of its legislature, accepted the grant thus made, and assumed the execution of the trust. The route of the road was surveyed, and a map of its location was filed in the land office at Washington. The adjoining odd sections within the prescribed limits were then withdrawn from sale by the proper officers of the government, and certified lists thereof, approved by the Secretary of the Interior, were delivered to the State.

Subsequently, on the 5th of May, 1864, Congress passed another act on the same subject, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin." (13 Stat. at Large, 66.) By its first section additional land was granted to the State upon the same terms and conditions contained in the previous act, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake,

between township twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by the State, to Bayfield, and the time for the completion of the road, as mentioned in the previous act, was extended for the period of five years from the passage of the last act. The State, through its legislature, accepted this grant also.

There were also some other grants made by the act for other railroads.

The road here mentioned, and which is a part of the road designated in the act of 1856, has never been constructed, nor has any part of it been constructed, and Congress has not passed any act since 1864, extending the time for its construction. Nor has Congress passed any act, nor have any judicial proceedings been taken by any branch of the government, to enforce a forfeiture of the grants for failure to construct the road within the period prescribed.

The complaint in the case, alleged property and right of possession in the plaintiffs. The answer, among other matters, traversed these allegations.

It was stipulated by the parties that the plaintiffs were in the quiet and peaceable possession of the logs at the time of their seizure by the defendant, and that such possession should be conclusive evidence of title in the plaintiffs, against evidence of title in a stranger, unless the defendant should connect himself with such title by agency or authority in himself, and that the seizure of the property by the defendant was, so far as the manner of making the same was concerned, valid and legal in all respects, as though made under and by virtue of legal process, the evident object of the stipulation being to test the right of the parties to the property, independent of the manner of its seizure.

By an act of the legislature of Wisconsin, of March 3d, 1869 the governor of the State was authorized to appoint competent persons as agents of the State, whose duty it was made to preserve and protect the timber growing upon the lands granted by the acts of Congress, and to take into possession, on behalf of the State, any logs and timber which might be cut on or carried away from those premises without lawful authority, wherever the same might be.

The evidence showed that defendant was appointed agent of the State under this act, and that, as such agent, he seized the logs for which the present action was brought; that the logs were

during the years 1870 and 1871, floated from the places where they were cut, down the river St. Croix, into a boom at Stillwater, in the State of Minnesota, and were there intermingled with other logs of similar character and marks, belonging to the plaintiffs, so that the particular logs cut on the lands granted to the State could not be distinguished from logs cut on other lands: that the boom from which the defendant seized the logs in suit, was two and a half miles long, and from one to three-fourths of a mile wide, and contained about three hundred millions of feet of pine logs: that the defendant, before the seizure, demanded of the plaintiffs the logs cut on the lands granted, and the plaintiffs refused to deliver them.

The defendant contended, in support of the seizure, and of his right to the possession of the property—

1st. That the act of Congress of June 3d, 1856, and the first section of the act of May 5th, 1864, passed the legal title to the lands designated therein to the State of Wisconsin, in trust for the construction of the railroad mentioned.

2d. That the lands designated have not reverted to the United States, although the road was not constructed within the period prescribed, no judicial proceedings, nor any act on the part of the government, having been taken to forfeit the grants.

3d. That the legal title to the lands being in the State, it was the owner of the logs cut thereon, and could authorize the defendant, as its agent, to take possession of them, wherever found; and,

4th. That, under the law of Minnesota, the plaintiffs having mingled the logs cut by them on the lands of the State, with other logs belonging to them, so that the two classes could not be distinguished, the defendant had a right, after demand upon the plaintiffs, to take from the mass a quantity of logs equal to those which were cut on the lands of the State.

The plaintiffs controverted these several positions, and contended, besides, that under the stipulation of the parties, and the pleadings in the case, no proof of title in the State was admissible; and that, if the acts of Congress vested a title in the State, that title was transferred by the nineteenth section of an act of its legislature, passed March 10th, 1869, to the St. Croix and Superior Railroad Company, a corporation then created for the purpose of constructing the railroad designated in those acts. That section was as follows:

"For the purpose of aiding in the construction of the railway hereby

incorporated, the State of Wisconsin hereby transfers unto said company all the rights, title, interest, and estate, legal or equitable, now owned by the State, in the lands heretofore conditionally granted to the St. Croix and Superior Railroad Company, for the construction of a railroad and branches; and * * * does further grant, transfer and convey unto the said railway company * * * the possession, right, title, interest, and estate which the said State of Wisconsin may now have, or shall hereafter acquire of, in, or to any lands, through gift, grant, or transfer from the United States, or by any act of the Congress of the United States, amending 'An act granting a portion of the public lands of the State of Wisconsin to aid in the construction of a railroad, approved June 3d, 1856,' and the act or acts amendatory thereof, or by any future acts of the Congress of the United States, granting lands to the State of Wisconsin, so far as the same may apply to, and in the construction of, a railroad from Bayfield, in the county of Bayfield, in a southwesterly direction, to the intersection of the main line of the Northern Wisconsin Railway, from the lake or river St. Croix to Superior, to have and to hold such lands, and the use, possession, and fee in the same, upon the express condition to construct the herein described railway within the several terms and spaces of time set forth and specified in the next preceding section of this act; *and upon the construction and completion of every twenty miles of said railway, the said company shall acquire the fee simple absolute in and to all that portion of lands granted to this State, in any of the ways hereinbefore described by the Congress of the United States, appertaining to that portion of the railway so constructed and completed.*"

The following provisions of law are in force in Minnesota, and were in force when the logs in suit were seized by the defendant:

"SECTION 2. In cases where logs or timber bearing the same mark, but belonging to different owners in severalty, have, without fault of any of them, become so intermingled that the particular or identical logs or timber belonging to each cannot be designated, either of such owners may, upon a failure of any one of them, having possession, to make a just division thereof, after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber and no other." (Chapter 59, General Laws of Minnesota, approved March 1st, 1865.)

The court below being of opinion in favor of the defendant, on the different points raised, he obtained judgment that he recover possession of the property which had been replevied from him after his seizure of the same, or the sum of $16,809, their value and costs. To reverse this judgment the plaintiffs brought the case here on writ of error.

Mr. E. C. Palmer for the plaintiff in error.

I. *Under the pleadings and stipulation evidence of title in the State was inadmissible.* (*Austice* v. *Holmes*, 3 Denio., 244; *Harrison* v. *McIntosh*, 1 Johnson, 380; *Rogers* v. *Arnold*, 12 Wendell, 30; *Prosser et al.* v. *Woodward*, 21 Wendell, 205; 3 Chitty's Pleadings, 1044, title "Replevin;" General Statutes of Minnesota, ch. 66, §§ 79, 133; *Coit* v. *Waples et al.*, 1 Minnesota, 134; *Finley* v. *Quirk*, 9 Minnesota, 194.)

When the defendant in replevin claims a return of the property replevied, he occupies, as to his own title or claim, the position of a plaintiff. (General Statutes of Minnesota, ch. 66, title viii, and sec. 119.) His answer, therefore, should set up the same facts substantially which would be required in a complaint.

II. *The court below improperly held that the legal title to the lands embraced in the acts of Congress of June 3d, 1856, and May 5th, 1864, still remained in the State of Wisconsin.*

1. The acts of Congress did not constitute a grant *in presenti*. The State acquired under them only a permissive right to dispose of said lands, for a defined purpose, upon complying with certain conditions named in the acts, and acquired no title of *any degree* in the lands. It was not upon the theory that this proposed road was a State need that this appropriation of the national resources was made, but upon the theory that it was a national need. It is true the State of Wisconsin was interested in the results of the improvement, but the national policy of making internal improvements would forbid her to assert that she was more than the local agent of the federal government in carrying out the object of this appropriation. The purpose and end of the grant do not require the construction that the State takes the legal title *in presenti*, by virtue of the acts. It must be presumed that Congress in passing the acts considered that the general good would be best subserved by such application of a portion of the public lands, and so made provisions, through the agency of the States and their representatives, the railroad companies, to dispense, as the improvements go on, the fund provided to further such object.

2. It is a general rule that all public grants are to be construed strictly and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. (*Rice* v. *Railroad Company*, 1 Black, 380; *Mills et al.* v. *St. Clair County*, 8 Howard, 581; *Richmond Railroad* v. *The Louisa Railroad*, 13 Howard, 81;

Commonwealth v. *The Erie, &c., Railroad Company*, 27 Pennsylvania State, 339; *Dubuque, &c., Railroad* v. *Litchfield*, 23 Howard, 66–88; *United States* v. *Arredondo*, 6 Peters, 691.)

3. That the acts of Congress were not *per se* a grant *in presenti* to the State of all the lands therein described, and that a present right, estate, and interest in the same, did not pass by the terms of the acts, is settled by the case in this court of *Rice* v. *Railroad Company* (1 Black, 376.) There the matter is considered in the interpretation of the grant made by Congress on the 29th of June, 1854, to the Territory of Minnesota; a grant, so far as the present question is concerned, identical with this one.

III. *If the title passed to the State by the said acts, such title reverted to the United States, no part of the road having been built at the expiration of the period limited in the grant.* (*Rice* v. *Railroad Co.*, 1 Black, 381; *United States* v. *Wiggins*, 14 Peters, 334; *Buyck* v. *United States*, 15 Peters, 215; *O'Hara et al.* v. *United States*, 15 Peters, 275; *Glenn* v. *United States*, 13 Howard, 250; *Kennedy et al.* v. *Heirs of McCartney*, 4 Porter, 141.)

Here was a grant or appropriation of part of the public domain for a defined purpose, upon condition that such purpose should be accomplished within a time limited. It was founded upon no consideration, unless the road, in aid of which the appropriation was made, should be built. The lands could not be sold until certain defined portions of the road should be constructed and due proof thereof made to the Secretary of the Interior. At the expiration of the time limited, all lands not patented were to revert to the United States.

The court below held that such lands did not *ipso facto* revert to the United States by mere failure to build the road within the period prescribed by the act of Congress; and that to effect the forfeiture some act on the part of the general government evincing an intention to take advantage of such failure is essential.

This position is met in *Rice* v. *Railroad Company* already cited. The court there says: "Neither of the sections * * * contain any words which necessarily and absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly the words employed are sufficient to have that effect, and if not limited or restricted by the context or other parts of the act, they would properly receive that construction, but the word grant is not a technical word, like the word *enfeoff*, and although if used broadly without limitation or restriction, it would carry an estate or interest

in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted and to apply the proceeds arising out of it to the use and benefit of the grantor."

Indeed, public policy demands that the government should not be required to take any step in order to place lands embraced in such public acts, as are now under consideration, in their former condition, at the precise time provided in the act. To require a judicial declaration of forfeiture would clog the free disposition of the public lands, which the government ought at all times to be able to exercise in furtherance of the public interests. And it is not clear how or where such proceeding could be instituted, or who would be necessary parties thereto. An act of Congress, or an order of the land department or Secretary of the Interior, could not conclude any one or divest title previously vested.

The rule as sometimes applied to private grants rests upon the principle, that such grants carry the fee of the land, and the right of actual occupancy for such purposes as the grantee desires to effect, subject, however, to certain conditions, which, if unperformed, may operate as a defeasance, provided the grantor shall re-enter for condition broken; that the title or interest of the grantee is an estate which can be encumbered or transferred by deed, like other real property, and cannot be diverted, except by judicial proceedings instituted for that purpose.

Under the act of 1864 no land could be sold until twenty miles were constructed, and then only those sections which were coterminus with the constructed line, not by the State, but by the companies. No road can be constructed after ten years under the first act, nor after five years from May 5, 1864, under the second. Under this act the State posesses no disposing power over the lands by sale or conveyance. Unless, therefore, the State can create or designate certain railroad corporations to receive the grant, there can occur no contingency in which the State would have any duty to perform or any right or power in the premises. Such case, irrespective of the question of legal title, bears no analogy to a private grant, where the estate and power of the grantee are as ample, in the beginning and until re-entry or forfeiture judicially declared, as if the grant contained no conditions whatever.

IV. *If the State acquired title by the acts of Congress, that title*

passed under the legislation of the State, in 1869, *to a corporation incorporated to construct the road.*

The nineteenth section of the act of March 10th, 1869 (quoted *supra*), was a present grant of the interest of the State. The State after this had no power to protect the land from trespassers or to seize the timber cut.

V. *The defendant could not lawfully seize the logs in controversy, because they could not be identified as the logs cut on the lands of the State.*

The statute of Minnesota has no relation to the action of replevin, and cannot avail the defendant herein, whatever effect it would have upon the measure of damages in an action of trover. At common law, the rule is without exception in replevin, that the property must be identified, or the action will not lie.

Messrs. J. C. Sloan, B. J. Stevens, and *J. C. Spooner contra.*

I. Under the *pleadings* it was competent for the defendant to prove title in a stranger, and in that way to defeat the plaintiffs. (*Dermott* v. *Wallach*, 1 Black, 96.) Such proof went directly to meet a material allegation of the plaintiffs. Proving title in the State of Wisconsin, "a stranger" would, indeed, under the *stipulation*, have been insufficient: but when after proving the acceptance by the State of the grants, sufficient evidence was given that the defendant had been the agent of the State for the preservation and protection of the timber growing on the lands embraced in the grants, and that he had authority to so protect them; that his seizure and possession of the logs in controversy were as such agent, and under the authority given him by the State of Wisconsin, pursuant to its laws, it "connected the defendant with such title by competent evidence of authority or agency in himself." The evidence was thus competent under the pleading, material to the issues, strictly proper in itself, and in literal fulfillment of the stipulation.

II. That the acts of Congress vested an estate *in presenti* is proved by *Rutherford* v. *Greene's Heirs*, 2 Wheaton, 196; *Lessieur* v. *Price*, 12 Howard, 59, and by other cases. (*United States* v. *Percheman*, 7 Peters, 51; *Mitchell* v. *United States*, 9 Peters, 711; *United States* v. *Brooks*, 10 Howard, 442; *Ludiga* v. *Roland*, 2 Howard, 581.)

In *Rice* v. *Railroad Company*, the act which it was said made the grant, unlike the act of 1856, which made the grant here, in

terms provided *that the title should not rest until* the road, or portions thereof, were built. That grant was repealed by Congress before any disposition of it *became operative*, and it was held by a majority of this court that the act vested in the territory "a mere naked trust or power to dispose of the lands in the manner therein specified," and until the power was in fact executed was the subject of repeal; but that if the clause providing that the title should not vest, &c., had been omitted, it would have been similar to the grant considered in *Lessieur* v. *Price*, and been "*a present grant*." The case is plainly distinguishable from ours, and in fact accords with the judgment below.

III. It is argued in effect that the words in the act "shall revert to the United States," were intended as a declaration of forfeiture in advance; but until forfeiture has been incurred it is not competent for the legislature to declare it, because the legislature cannot know in advance whether or not it may not wish to waive the forfeiture. The words are merely definitive of the condition for the non-performance of which the legislature may thereafter declare a forfeiture, and are to be construed in connection with the whole act, and in the light of the objects to be accomplished thereby.

In the case of *United States* v. *Repentigny*, 5 Wallace, 267, the corresponding words were, "and that in default thereof the same *shall* be reunited to his Majesty's domain"—words equally imperative with those of the act in question—and yet they were held not to be a declaration of forfeiture, but as definitive of the condition merely.

Even where the condition provides that the estate shall be *void* on non-performance, the estate is not defeated without some act or declaration of the grantor. (*Sneed* v. *Ward*, 5 Dana, 187; *Cross* v. *Coleman*, 6 Dana, 446.) This is one of the most ancient principles of the common law, assumed as settled in cases reported as far back as Leonard, Sir Francis Moore, Plowden, Coke and Croke. (*Sir Moyle Finch's Case*, 2 Leonard, 143; same case, Moore, 296; *Willion* v. *Berkley*, 1 Plowden, 229; *Sir George Reynel's Case*, 9 Reports, 96, *b*; *Parslow* v. *Corn*, *Croke*, Eliz., 855), vouching the Year Books, and affirmed by many modern decisions. (*Railroad Company* v. *Smith*, 9 Wallace, 95; *Hornsby* v. *United States*, 10 Wallace, 224; *Marwick* v. *Andrews*, 25 Maine, 525; *Guild* v. *Richards*, 16 Gray, 309; *United States* v. *Repentigny*, 5 Wallace, 267; *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch,

631; *Smith* v. *Maryland*, 6 Cranch, 286; *Little* v. *Watson*, 32 Maine, 214; *People* v. *Brown*, 1 Craine's Reports, 416; *Nicoll* v. *New York and Erie Railroad Co.*, 12 New York, 121; *Osgood* v. *Abbott*, 58 Maine, 73; *Sneed* v. *Ward*, 5 Dana, 187; *Cross* v. *Coleman*, 6 Dana, 446; *Towle* v. *Smith*, 2 Robertson's New York, 489; *Duncan* v. *Beard*, 5 South Carolina (2 Nott & McCord), 405; *Wilbur* v. *Tobey*, 16 Pickering, 177; *Thompson* v. *Bright*, 1 Cushing, 428; *Fremont* v. *United States*, 17 Howard, 560.) In the case of an individual it is by entry; in the case of the government by office found.

As Congress is the grantor in the case at bar, and has sole authority to dispose of the public domain by grant, Congress alone can declare the intention to enforce the forfeiture. As held by the court in *United States* v. *Repentigny*, *supra*, an act of Congress is an equivalent for office found. The election to waive the forfeiture or to enforce it rests with Congress. It is a question of intention, and no department of the government, either the executive or judicial, can know what the pleasure of Congress may be, and cannot, therefore, treat the title to the lands as revested until Congress has declared its intention in that regard.

This court will take judicial notice of the proceedings of Congress, and therefore we refer to the facts that on two or more occasions Congress has refused to declare and enforce the forfeiture of the grant in question; that bills having passed the House were rejected in the Senate, showing an intention on the part of Congress to waive a forfeiture, if one has in fact been incurred.

We may also refer to the fact that more than two-thirds of the line of railroad authorized by the act of June 3d, 1856, has been constructed, is recognized and shown by various acts of Congress.

Conditions subsequent are not favored in law, and are construed strictly. (*United States* v. *Repentigny*, 5 Wallace, 267; *Emerson* v. *Simpson*, 43 New Hampshire, 475; *Hooper* v. *Cummings*, 45, Maine, 359.)

IV. The act of the legislature of Wisconsin of March 10th, 1869, did not transfer the title to the lands from the State to the railroad company in the way alleged by opposing counsel.

1. The State could only dispose of the lands in the manner provided by the act of Congress of June 3d, 1856—that is, as fast as the railroad was constructed. It was thus a trustee, with power of disposal limited by the act creating the trust.

2. The concluding terms of section nineteen (italicized *supra*) are to be construed with that earlier portion of the section, which might be sufficient in form to convey a present title, and modifies and limits its operation. The specific declaration as to the time when the title in fee should vest is equivalent to a provision that the fee shall not vest except as the road is constructed. (*Rice* v. *Railroad*, 1 Black, 358.)

V. The last point made by opposing counsel is answered by the statute of Minnesota, whose words are too plain to be misconstrued.

MR. JUSTICE FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The position of the plaintiffs, that under the stipulation of the parties and the pleading, no proof of title in the State to the logs in controversy was admissible, cannot be sustained. The complaint alleges property and right of possession in the plaintiffs: the answer traverses directly these allegations, and under the issue thus formed any evidence was admissible on the part of the defendant which went to show that the plaintiff had neither property nor right of possession. Evidence of title in the State would meet directly the averment, upon proof of which the plaintiffs could alone recover; and the stipulation was evidently framed upon the supposition that title in the State—for there was no other stranger—would be offered, and it provided for the inconclusiveness of the evidence against the possession of the plaintiffs unless the defendant connected himself with the title. The admitted quiet and peaceable possession of the property by the plaintiffs at the time of the seizure was *prima facie* evidence of title, and threw the burden upon the defendant of establishing the contrary.

The position that if the acts of Congress vested in the State a title to the lands designated, that title was transferred by the act of its legislature, passed March 10th, 1869, is equally untenable. The State by the terms of the grants from Congress possessed no authority to dispose of the lands beyond one hundred and twenty sections, except as the road, in aid of which the grants were made, was constructed.

The company named in the act never constructed any portion of such road, and there is no evidence that the State ever exercised

the power to sell the one hundred and twenty sections authorized in advance of such construction.

The acts of Congress made it a condition precedent to the conveyance by the State of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company.

Besides, it is evident, notwithstanding the words of transfer to the company contained in the first part of the ninteenth section of the act of the State, that it was not the intention of the State that the title should pass except upon the construction of the road. Its concluding language is that "upon the construction and completion of every twenty miles of said railway the said company shall acquire the fee simple absolute in and to all that portion of the land granted" to the State appertaining to the portion of the railway so constructed and completed.

We proceed, therefore, to the consideration of the several grounds upon which the defendant justifies his seizure of the logs in controversy, and claims a return of them to him.

1. That the act of Congress of June 3d, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, "*that there be, and is hereby, granted* to the State of Wisconsin" the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the* disposal of the legislature thereof;" and the fourth section provides in what manner sale shall be made, and enacts that if the road be not completed within ten years "no further sale shall be made, and the lands unsold shall *revert* to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

In the case of *Rutherford* v. *Greene's Heirs*, reported in the

second of Wheaton, a similar construction was given by this court to an act of North Carolina, passed in 1782, which provided that twenty-five thousand acres of land should be allotted and given to General Greene and his heirs within the limits of a tract reserved for the use of the army, to be laid off by commissioners appointed for that purpose. The commissioners pursuant to the directions of the act allotted the twenty-five thousand acres and caused the quantity to be surveyed and the survey to be returned to the proper office, and the questions raised in the case related to the validity of the title of General Greene, and the date at which it commenced. The court held that the general gift of twenty-five thousand acres lying in the territory reserved, became by the survey a particular gift of the quantity contained in the survey, and concluded an extended examination of the title, by stating that it was the clear and unanimous opinion of the court, that the act of 1782, vested a title in General Greene to the twenty-five thousand acres to be laid off within the bounds designated, and that the survey made in pursuance of the act gave precision to that title and attached it to the land surveyed.

On the 6th of March, 1820, Congress passed an act for the admission of Missouri into the Union, and among other regulations to aid the new State, enacted, "that four entire sections of land be, and the same are hereby granted to said State for the purpose of fixing the seat of government thereon, which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States." In *Lessieur* v. *Price*, reported in the twelfth of Howard, the operation of this act was considered: and the court said:

"The land was granted by the act of 1820: it was a present grant, wanting identity to make it perfect: and the legislature was vested with full power to select and locate the land: and we need only here say, what was substantially said by the court in the case of *Rutherford* v. *Greene's Heirs*, that the act of 1820 vested a title in the State of Missouri of four sections; and that the selection made by the State legislature pursuant to the act of Congress, and the notice given of such location to the surveyor general and the register of the local district where the land lay, gave precision to the title, and attached to it the land selected.

The United States assented to this mode of proceeding; nor can an individual call it in question."

Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title, where the United States are satisfied with them.

The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.

The case of *Rice* v. *Railroad Company*, reported in the first of Black, does not conflict with these views. The words of present grant in the first section of the act there under consideration were restrained by a provision in a subsequent section, declaring that the title should not vest in the Territory of Minnesota until the road or portions of it were built.

The grant of additional land by the first section of the act of Congress of 1864 is similar in its language and is subject to the same terms and conditions as the grant by the act of 1856. With the other grants, made by the act of 1864, we are not concerned in the present case.

2. The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. In Sheppard's Touchstone, it is said: "If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, &c., or that he shall take it again and turn it to his own profit, or *that the land shall revert*, or that the feoffer shall *recipere* the land, these are, either of them, good words in a condition to give a re-entry—as good as the word 're-enter'—

and by these words the estate will be made conditional." (Sheppard's Touchstone, 125.)

The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert, if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed in the act.

And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. (Sheppard's Touchstone, 149; *Nicoll* v. *New York and Erie Railroad Company*, 12 New York, 121; *People* v. *Brown*, 1 Caines' Reports, 416; *United States* v. *Repentigny*, 5 Wallace, 267; *Dewey* v. *Williams*, 40 New Hampshire, 222; *Hooper* v. *Cummings*, 45 Maine, 359; *Southard* v. *Central Railroad Company*, 2 Dutcher, 13.)

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial

investigation, or by taking possession directly under the authority of the government without these preliminary proceedings. (*United States* v. *Repentigny*, 5 Wallace, 211, 268; and see *Finch* v. *Riseley*, Popham, 53.) In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.

3. The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty: being severed from the soil its character was changed; it became personalty, but its title was not affected: it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

4. The logs cut from the lands of the State without license, having been intermingled by the plaintiffs with logs cut from other lands, so as not to be distinguishable, the owner was entitled, under the legislation of Minnesota, and the decision of her courts, to replevy from the whole mass an amount equal to those cut by the plaintiffs, and the stipulation of the parties provides that the seizure by the defendant, so far as the manner of making the same is concerned, was as valid and legal in all respects as though made under and by virtue of legal process. The remedy thus afforded by the law of Minnesota is eminently just in its operation, and is less severe than that which the common law would authorize.

We perceive no error in the rulings of the court below, and the judgment is, therefore. *Affirmed.*

NOTE.—Also see *Tucker* v. *Ferguson*, 22 Wallace, 527; *Farnsworth* v. *Railroad Company*, 2 Otto, 49; *Chamberlain* v. *Railroad Company*, 2 Otto, 299; *Railroad Company* v. *Dyer*, 1 Sawyer, 641; *Railroad Company* v. *Tenis*, 41 Cal., 489; *Johnson* v. *Ballou*, 28 Mich., 379.

RAILROAD LAND COMPANY v. COURTRIGHT.

October Term, 1874.—21 Wallace, 310.

On the 15th of May, 1856, Congress passed an act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State." (11 Stat. at Large, 9.) That act granted to the State for the purpose of aiding in the construction of a railroad between certain specified places, alternate sections of land, designated by odd numbers, for six sections in width on each side of the road, to be selected within fifteen miles therefrom. And the act declared that the lands thus granted should be exclusively applied to the construction of the road, and be subject to the disposal of the legislature for that purpose and no other, and only in the manner following, that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of the road were completed, then another like quantity of the land granted might be sold, and so, from time to time, until the road was completed.

The State of Iowa, by act of its legislature, passed on the 14th of July, 1856, accepted the grant thus made, and provided for the execution of the trust. By that act the State granted to the Iowa Central Air-line Railroad Company, a corporation created by its legislature for the construction of the railroad, "the lands, interests, rights, powers, and privileges" conferred by the act of Congress, upon the express condition, however, that in case the company should fail to have completed and equipped seventy-five miles of the road within three years from the 1st day of December then next following, and thirty miles in addition in each year thereafter for five years, and the remainder of its whole line in one year thereafter, or on the 1st of December, 1865, then it should be competent for the State to resume all rights to the lands conferred by the act, remaining undisposed of by the company. The company accepted the grant from the State, with its conditions, and immediately thereafter caused a survey and location of the line of the road to be made, a map of which was filed in the proper offices in the State and at Washington.

During the years of 1857 and 1858 the company performed a large amount of grading upon the road, and sold one hundred and twenty sections of the land granted, a portion of them to the contractor who graded the road, which sections were selected within a continuous twenty miles of the line of the road. The selections were approved by the Secretary of the Interior, and the sections were certified by him to the State. Those, however, selected were not from lands lying along the eastern end of the road, as they might have been, but from lands lying further west. Although the company did a large amount

of grading, it never completed any part of the road, and in March, 1860, the legislature of Iowa resumed the lands, interests, rights, powers, and privileges conferred upon the company, and repealed the clauses of the act granting them. *Held*—

1st. That the act of Congress authorized a sale of one hundred and twenty sections in advance of the construction of any part of the road, and that it was only as to the sale of the remaining sections that the provision requiring a previous completion of twenty miles applied;

2d. That there was no restriction upon the State as to the place where the one hundred and twenty sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side; and that they might be selected from lands adjoining the eastern end of the road or the western end, or along the central portion;

3d. That the company mentioned in the act of the State of July 14th, 1856, took the title and interests of the State upon the terms, conditions, and restrictions expressed in the act of Congress, and that the further conditions as to the completion of the road imposed by the State were conditions subsequent; and—

4th. That the purchasers of the one hundred and twenty sections took a good title to the property, although no part of the road was constructed at the time.

ERROR to the Supreme Court of Iowa.

On the 31st of January, 1870, Milton Courtright brought, in a district court in the State of Iowa, an action against the Iowa Railroad Land Company for the possession of certain real property situated in that State, being part of the lands embraced in the act of Congress approved May 15th, 1856. (An act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State." 11 Stat. at Large, 9.)

That act granted to the State, for the purpose of aiding in the construction of a railroad from Lyons City, in that State, northwesterly, to a point of intersection with the main line of the Iowa Central Air-line Railroad, near Maquoketa, and thence to the Missouri river, alternate sections of land, designated by odd numbers, for six sections in width on each side of the road, to be selected within fifteen miles therefrom, with a provision that if it should appear, when the route of the road was definitely fixed, that the United States had sold of the lands thus designated any sections or parts of sections, or the right of pre-emption had attached to them, other lands of equal quantity in alternate sec-

tions might be selected from adjoining lands of the United States. And the act declared that the lands thus granted should be exclusively applied to the construction of the road, and be subject to the disposal of the legislature for that purpose and no other, and only in the manner following, that is to say, a quantity of land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road might be sold; and when the governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of the road were completed, then another like quantity of the land granted might be sold, and so from time to time until the road was completed; and that if the road was not completed within ten years no further sales should be made, and the lands unsold should revert to the United States.

The State of Iowa, by act of its legislature, passed on the 14th of July, 1856, accepted the grant thus made, and provided for the execution of the trust. (Laws of 1856 of Iowa, p. 1.) By that act the State granted to the Iowa Central Air-line Railroad Company, a corporation created by its legislature for the construction of the railroad, "the lands, interests, rights, powers, and privileges" conferred by the act of Congress, upon the express condition, however, that in case the company should fail to have completed and equipped seventy-five miles of the road within three years from the first day of December then next following, and thirty miles in addition in each year thereafter for five years, and the remainder of its whole line in one year thereafter, or on the first of December, 1865, then it should be competent for the State to resume all rights to the lands remaining undisposed of by the company, and all other rights conferred by the act. The company accepted the grant from the State, with its conditions, and immediately thereafter caused a survey and location of the line of the road to be made, a map of which was filed in the proper offices in the State and at Washington.

During the years 1857 and 1858 the company performed a large amount of grading upon the road, principally between Lyons and Maquoketa.

The plaintiff was one of the contractors who did the grading, and he received in payment for his work construction bonds and land scrip of the company. These were afterward surrendered, and in consideration thereof the land in controversy was sold and conveyed by the company to him. The land thus conveyed was

a part of the first and only one hundred and twenty sections sold by the company, and these sections were selected within a continuous twenty miles of the line of the road. The selections were approved by the Secretary of the Interior, and the sections were certified by him to the State. Those, however, selected were not from lands lying along the the eastern end of the road, as they might have been, but from lands lying further west.

Although the company did a large amount of grading, as already mentioned, it never completed any part of the road, and in March, 1860, the legislature of Iowa resumed the lands, interests, rights, powers and privileges conferred upon the company, and repealed the clause of the act granting them. Subsequently, during the same month, it conferred the same lands, rights, powers and privileges upon the Cedar Rapids and Missouri River Railroad Company, another corporation created under its laws, declaring, however, that the right, title and interest held by the State in the lands, and nothing more, was conferred.

This grant by the State was recognized by the act of Congress of June 2d, 1864, amendatory of the original act of 1856. (13 Stat. at Large, 95.) By its fourth section it was expressly provided that nothing in the act should be construed to interfere with or in any manner impair any rights acquired by any railroad company named in the original act, or the rights of any corporation, person or persons, acquired through any such company, nor be construed to impair any vested rights of property, but that such rights should be reserved and confirmed. The new company afterwards transferred all its interests in the lands to the defendant, the Iowa Railroad Land Company.

The question at issue between the parties, and litigated in the State District Court, was whether the plaintiff, Courtright, took a good title to the lands in controversy by the conveyance from the first company—the Iowa Central Air-Line Railroad Company—or whether that title failed to pass to the plaintiff by reason of the time in which the lands were sold being in advance of the construction of twenty miles of the road, and of the place of their selection not being along the line of the proposed road from its commencement on the east, and of the failure of that company to construct the length of road designated within the time prescribed, such construction being insisted upon as a condition precedent, and therefore passed by the grant of the State in March, 1860, to the Cedar Rapids and Missouri River Railroad Company;

and by conveyance from that company to the defendant, the Iowa Railroad Land Company.

The District Court gave judgment for the plaintiff, and the Supreme Court of the State affirmed that judgment, and the case was brought here on writ of error.

Messrs. I. Cook, N. M. Hubbard, and *J. F. Wilson* for the plaintiffs in error.

Mr. Platt Smith contra.

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:

The question for determination is, whether the plaintiff took a good title to the lands in controversy under the conveyance from the first company, the Iowa Central Air-Line Railroad Company, or whether that title is vested in the last company, the Iowa Railroad Land Company.

It is contended by the defendants: *First*, that under the act of Congress of May 15th, 1856, no lands could be sold by the State until twenty continuous miles of the road were constructed; *second*, that if one hundred and twenty sections could be sold in advance of such construction, they could only be taken from lands adjoining the line of the road from its commencement on the east; and, *third*, that the grant by the State to the first company was upon conditions precedent, which, not having been complied with, the title did not pass. Neither of these positions can, in our judgment, be maintained. The act of Congress by its express language authorized a sale of one hundred and twenty sections in advance of the construction of any part of the road. It was only as to the sale of the remaining sections that the provision requiring a previous completion of twenty miles applied. It is true it was the sole object of the grant to aid in the construction of the railroad, and for that purpose the sale of the land was only allowed as the road was completed in divisions, except as to one hundred and twenty sections.

The evident intention of Congress in making this exception was to furnish aid for such preliminary work as would be required before the construction of any part of the road. No conditions, therefore, of any kind were imposed upon the State in the disposition of this quantity, Congress relying upon the good faith of the State to see that its proceeds were applied for the purposes contemplated by the act.

Nor was there any restriction upon the State as to the place where the one hundred and twenty sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side. They might be selected from lands adjoining the eastern end of the road or the western end, or along the central portion.

The act of Congress of May 15th, 1856, was a grant to the State *in presenti*. It passed a title to the odd sections designated, to be afterwards located when the line of the road was fixed, and the location of the odd sections thus became certain, the title of the State acquired precision, and at once attached to the land. And the act of the State of July 14th, 1856, was also a grant *in presenti* to the first railroad company. That company took the title and interests of the State upon the terms, conditions, and restrictions expressed in the act of Congress. The further conditions as to the completion of the road imposed by the State were conditions subsequent, and not conditions precedent, as contended by the defendants. The terms in which the right is reserved by the act of the State to resume the lands granted imply what the previous language of the act declares, that a present transfer was made, and not one dependent upon conditions to be previously performed. The right is by them restricted to such lands as at the time of the resumption had not been previously disposed of. The resumption, therefore, of the grant by the failure of the first company to complete the road did not impair the title to the lands which the act of Congress authorized to be sold in advance of such completion, and which were sold by that company.

We are of opinion, therefore, that the plaintiff took a good title to the premises in controversy by his conveyance from that company. The judgment of the court below is, therefore,

Affirmed.

Republican River Bridge Company *v.* Kansas Pacific Railroad Company.

October Term, 1875.—2 Otto, 315.

1. The decision of the highest State court in which such decision could be had, adverse to a right under an act of Congress, set up in a chancery suit, or in any other case, where all the evidence becomes a part of the record in that court, the same record being brought here, can be re-examined upon the law and the facts, as far as may

be necessary to determine the validity of that right. In a common law action, where the facts are passed upon by a jury, or by a State court, or by a referee, to whom they have been submitted by waiving a jury, where the finding is, by the State law, conclusive, this court has the same inability to review those facts as it has in a case coming from a circuit court of the United States.

2. Congress, by joint resolution, granted to the defendant, subject to the approval of the President, "fractional section one," on the west side of a military reservation, provided the usefulness of the latter would not, in his opinion, be impaired for military purposes. The President, by an executive order, set aside to the defendant said fractional section, as designated on a map of survey accompanying the letter of the Secretary of the Interior. The court which tried the facts, having found that the fractional section was inside of the reservation, was in the possession of the defendant, and was the land claimed in this action, held that the title thereto was vested in the defendant.

Held, 1. That the finding being upon a mixed question of law and fact, and largely depending for its correctness on surveys not produced here, and there being no plat in the record, was not open to inquiry. 2. That, looking to the manifest intent of the joint resolution, and to the fact that the grant was not to be consummated until the President had determined that the usefulness of the reservation would not be thereby impaired, the description in the joint resolution meant such a fractional section *within* the reservation, on its west side. 3. That the title of the defendant became absolute on the issue of the President's order, and had relation back to the date of the passage of the joint resolution.

Error to the Supreme Court of the State of Kansas.

Mr. Robert McBratney for the plaintiff in error; and *Mr. William T. Otto contra.*

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Kansas. The contest in the State court concerned the title to real estate, both parties claiming under grants from Congress made at different times. In the district court for the county of Shawnee, where the suit was originally brought, the parties submitted the case to the court without the intervention of a jury: and that court found a series of facts, fourteen in number, on which it declared the law to be for the defendants. This judgment was affirmed on error in the Supreme Court of the State, which decision the present writ of error brings before us.

The finding by the district court was received by the Supreme

Court of the State as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress, in a State court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here.

In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court, on both the law and the fact, so far as may be necessary to determine the validity of the right so set up under the act of Congress: but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common law action, this court has the same inability to review those facts, in a case coming from a State court, that it has in a case coming from a circuit court of the United States.

This conclusiveness of the facts found, extends to the finding by a State court, to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury. (*Boggs* v. *The Merced Mining Co.*, 3 Wall. 304.)

Two propositions of law, ruled by the State court, were excepted to by plaintiff, the first of which gives construction to grant under which the plaintiff claimed. The first is in the following language:

"That the joint resolution passed by Congress, approved July 26, 1866, was and must be construed as a grant by Congress, to the defendant, of the land in controversy; and that, upon the issuance of the executive order of the President, dated July 19, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866."

This joint resolution here referred to, is as follows:

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled*, That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite "Riley City;" also, fractional section "one," on the west side of said reservation, near Junction City, for the same purposes; and also to restore, from time to time, to the public domain, any

portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; provided, that the President shall not permit the location of any such railroad, or the diminution of any such reserve, in any manner, so as to impair its usefulness for military purposes, so long as it shall be required therefor."

On the nineteenth day of July, 1867, the President, by an executive order, declared that, by virtue of said resolution, there is set apart to the Union Pacific Railroad Company, eastern division (which was then the corporate name of the defendant), the twenty acres of the Fort Riley military reservation, and fractional section one, on the west side of said reservation, near Junction City, for a depot and other purposes, as designated on a map or survey accompanying the letter from the Secretary of the Interior, of Feb. 15, 1867.

The first objection made here to the conclusion of law by the court, that the resolution and order confer title to the land in controversy, is, that the land of which defendant is in possession, as fractional section one, is a part of the reservation: whereas, the true construction of the joint resolution is, that it has reference to a fractional section one, lying outside of the reservation, and adjoining it on the west side.

No plat or survey, official or otherwise, accompanies this record, to enable us to understand or decide this question in a satisfactory manner, nor is this map or letter of the secretary in evidence. The circuit judge, among his findings of fact, states distinctly that the fractional section one, referred to in the joint resolution, is *inside* of the reservation, and is the piece of land now in possession of the defendant, and claimed by plaintiff in this action. So far as the correctness of this finding depends, as it must largely depend, on surveys not produced to us, it is not open here to inquiry; and as it must, from its very nature, be a mixed question of law and fact, which would be concluded by the verdict of a jury, it must be equally conclusive here; the law question being the construction of the words of the grant, and the fact being the manner in which the existing government surveys were made and numbered in reference to the fractional parts of section one.

Looking, however, to the manifest intent of the joint resolution, to the fact that neither the grant of the twenty acres confessedly a part of the reservation, nor of the fractional section one, was to be consummated until the President had determined

that both could be given up without impairing the usefulness of the reservation for military purposes, we are of opinion that fractional section one, on the west side of said reservation, meant such a section to be found in the reservation, on its west side.

The next objection is, that the grant does not purport to carry the fee; and, as it was only a use or equitable right, Congress had the power to grant the fee, as it did by the joint resolution of March 2, 1867, to plaintiff. It is certainly true that the joint resolution of March 2, and the patent issued under it to plaintiff, cover geographically the land in controversy; and *Frisbie* v. *Whitney*, 9 Wall., 187, and the *Yosemite Valley Case*, 15 *Id.*, 77, are relied on to show that Congress could grant the land to the other parties while the title of defendant was thus inchoate.

But there are two answers to this: 1. The title of the defendant, whatever it was, became absolute on the issuing of the President's order, and had relation back to the date of the joint resolution under which it was made. It is, therefore, whatever its nature, an elder title than that of plaintiff. It is not necessary here to decide whether it is a grant of the legal title, or only the grant of a use or easement; for in either case, it vests the possession, of which the defendant cannot be deprived by an action of ejectment. 2. The joint resolution under which plaintiff claims contains a proviso that nothing therein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States. As no other grant has been shown of any part of this land except the one under which the defendant claims, this proviso was no doubt intended to exempt it from plaintiff's grant; and, if there had been half a dozen other previous grants, it would have excepted them all as well as this from the operation of the joint resolution in which it is found.

In the first conclusion of law finding the title under the joint resolution of 1866, and the order of the President, to be in defendant, we find no error.

The other proposition, to which plaintiff excepted, declares that plaintiff had title to all the land covered by the joint resolution of March 2, 1867, and by the patent, except that claimed by defendant under the joint resolution of July 26, 1866.

As this conclusion follows necessarily from what we have already said, it is unnecessary to notice it further.

Judgment Affirmed.

NEWHALL v. SANGER.

October Term, 1875.—2 Otto, 761.

1. The act of July 1, 1862, (12 Stat., 492), grants to the Western Pacific Railroad Company every alternate section of public land designated by odd numbers, within the limits of ten miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. The act of 1864 (13 Stat., 358) enlarges those limits, and declares that the grant by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation, or mineral lands, or the improvement of any *bona fide* settler." *Held*, that lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, are not embraced by the grant to the company.
2. The words "public lands" are used in our legislation to describe such lands as are subject to sale or other disposition, under general laws.
3. The fiction of law, that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect.

APPEAL from the Circuit Court of the United States for the District of California.

Submitted on printed arguments by *Mr. Montgomery Blair* for the appellant, and by *Mr. George F. Edmunds* for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

The object of this suit is to determine the ownership of a quarter-section of land in California. The appellee, who was the complainant, claims through the Western Pacific Railroad Company, to whom a patent was issued in 1860, in professed compliance with the requirements of the acts of Congress commonly known as the Pacific Railroad Acts. The appellant derives title by mesne conveyances from one Ransom Dayton, the holder of a patent of a later date, which recites that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. The court below decreed that the appellee was the owner in fee simple of the disputed premises; and that the junior patent, so far as it related to them, should be canceled.

The act of July 1, 1862 (12 Stat., 492), grants to certain rail-

road companies, of which the Western Pacific, by subsequent legislation, became one, every alternate section of public land designated by odd numbers, within ten miles of each side of their respective roads, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. It requires that, within a prescribed time, a map designating the general route of each road shall be filed in the Department of the Interior, and that the Secretary thereof shall then cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. The precise date when the Western Pacific Company filed its map is not stated in the record; but we infer that it was between the first day of the December term (1864) of this court, and the thirteenth day of February, 1865. At all events, the withdrawal for this road was made on the 31st of January, 1865; and our records show that the Moquelamos grant, which had been regularly presented to the commissioners, under the act of March 5, 1851, and duly prosecuted by appeal, was rejected here February 13, 1865. It is a conceded fact, that the lands embraced by it fall within the limits of the railroad grant which were enlarged by the amendatory act of 1864 (13 Stat., p. 358.) This act also declares that any lands granted by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation, or mineral lands, or the improvements of any *bona fide* settler."

There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from its operation; and the question arises, whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term, in *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States*, *supra*. We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves;

and we confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact, that to them alone could the order withdrawing lands from pre-emption, private entry, and sale, apply.

The status of lands included in a Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the time it was ceded, and by our subsequent legislation. The rights of private property, so far from having been impaired by the change of sovereignty and jurisdiction, were fully secured by the law of nations, as well as by treaty stipulation. It had been the practice of Mexico to grant large tracts to individuals, sometimes as a reward for meritorious public services, but generally with a view to invite emigration and promote the settlement of her vacant territory. The country, although sparsely populated, was dotted over with land claims.

Exact information in regard to their extent and validity could hardly be obtained during the eager search for gold which prevailed soon after we acquired California. It was not until March 3, 1851, that our government created a commission to receive, examine, and determine them. As the operations of our land system, had it then been extended to California, would have produced the utmost confusion in titles to real estate within her limits, it was wisely withheld by Congress, until such claims should be disposed of. The act of that date declared that all lands, the claims to which should not have been presented within two years therefrom, should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant, to maintain his rights before the commission. He was not bound by its adverse decision, but was entitled to have it reviewed by the District Court, with a right of ultimate appeal to the Supreme Court. If he, however, neglected to take timely and proper steps to obtain such review, the decision was thereby rendered final and conclusive. The lands then fell into the category of public lands.

The same remark will apply to the judgment of the District Court; but if he prosecuted his appeal to the tribunal of last resort, the reserved lands retained their original character in all the successive stages of the cause, and they were regarded as forming a part of our national domain only after the claim covering them had been "finally decided to be invalid."

A failure therefore to present the claim within the required time, or a rejection of it either by the commission or by the District Court, without seeking to obtain a review of their respective decisions, or by this court, rendered it unnecessary to further reserve the claimed lands from settlement and appropriation. They then became public in the just meaning of that term, and were subject to the disposing power of Congress.

It may be said that the whole of California was part of our domain, as we acquired it by treaty, and exercised dominion over it. The obvious answer to all inferances from this acknowledged fact, so far as they relate to this case, is, that the title to so much of the soil as was vested in individual proprietorship did not pass to the United States. It took the remaining lands subject to all the equitable rights of private property therein, which existed at the time of the transfer. Claims, whether grounded upon an inchoat or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States, to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.

This is, in our opinion, the true interpretation of the act of 1851. Until recently it governed, it governed the action of the Interior Department upon the advice of the law officers of the government (11 Op. Att'y Gen., 493; 13 *Id.*, 388), and was, at least by implication, sanctioned by this court in *Frisbie* v. *Whitney*, 9 Wall., 187. No subsequent legislation conflicts with it. On the contrary, the excepting words in the sixth section of the act of March 3, 1853, introducing the land system into California (10 Stat., 246), clearly

denote that lands such as these, at the time of their withdrawal, were not considered by Congress as in a condition to be acquired by individuals or granted to corporations. This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title.

It is said that this means "lawfully" claimed: but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication. Besides the act of March 3, 1853, which authorized the settlement and purchase of the lands released by the operation of the law of 1851, there was a general law (10 Stat., 244) passed on the same day, which conferred upon a settler on lands theretofore reserved on account of claims under foreign grants, then or thereafter declared by the supreme court to be invalid, the rights granted by the pre-emption law, after the lands should have been released from reservation—a class of lands, which from an early day, it had been the policy to reserve until the adjustment of all such claims. (See act of 1811, 2 Stat., pp. 664, 665, sects. 6, 10.) This provision clearly implies that no right of pre-emption previously attached to lands of that description by reason of settlement and cultivation.

It is unnecessary to dwell longer upon this question, or to review subsequent statutes touching the government lands in California. It suffices to say, that there is nothing in any of them which weakens the construction we have given to the act of 1851. This controversy depends upon that act and the Pacific Railroad acts which we have cited.

The appellee invokes the doctrine, that judgments of a court during a term are, by relation, considered as having been rendered on the first day thereof. There is a fiction of law that a term consists of but one day: but such a fiction is tolerated by the courts only for the purposes of justice. (*Gibson* v. *Chouteau*, 13 Wall., 92.) To antedate the judicial rejection of a claim, so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice, and cannot be sanctioned.

As the premises in controversy were not public lands, either at the date of the grant or of their withdrawal, it follows that they did not pass to the railroad company.

Decree reversed, and cause remanded with direction to dismiss the bill.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE STRONG, dissenting.

I am not able to agree with the majority of the court in this case. The only exception made by Congress from its grant to the Western Pacific Railroad Company, consisted of lands within certain limits, which, at the time the line of the road was definitely fixed, had been "sold, reserved, or otherwise disposed of by the United States," or to which a pre-emption or homestead claim had then attached. The exception was intended to keep the public lands open to settlement and sale until the line of the road was established. I cannot understand how the presentation of a fraudulent claim to any portion of the lands within the limits designated, founded upon an invalid or forged Mexican grant, could change their character as public lands, or impair the title of the company, or have any other effect than to subject the company to the annoyance and expense of exposing and defeating the claim. Nor can I perceive the bearing upon the case of the act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned;" for that act applies only to pre-emption rights, and by its terms is limited to lands previously reserved.

I think the judgment of the court below should be affirmed.

LEAVENWORTH, LAWRENCE, AND GALVESTON RAILROAD COMPANY *v.* UNITED STATES.

October Term, 1875.—2 Otto, 733.

1. Where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.
2. The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee, applies as well to grants to a State to aid in building railroads as to one granting special privileges to a private corporation.
3. The doctrine in *Wilcox* v. *Jackson* 13 Pet., 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to military reservations, inasmuch as the latter are the absolute property of the government, whilst in the former other rights are vested.

4. When Congress enacts "that there be and is hereby granted" to a State, to aid in the construction of a specified railroad, "every alternate section of land, designated by odd numbers," within certain limits of each side of the road, the State takes an immediate interest in land so situate, whereto the complete title is in the United States at the date of the act, although a survey of the land and a location of the road are necessary to give precision to the title and attach it to any particular tract. Such a grant is applicable only to public land owned absolutely by the United States. No other is subject to survey and division into such sections.
5. Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them.
6. A proviso, that any and all lands heretofore reserved to the United States, for any purpose whatever, are reserved from the operation of the grant to which it is annexed, applies to lands set apart for the use of an Indian tribe under a treaty. They are reserved to the United States for that specific use; and, if so reserved at the date of the grant, are excluded from its operation. It is immaterial whether they subsequently become a part of the public lands of the country.
7. The act of March 3, 1863 (12 Stat., 772), to aid in the construction of certain railroads in Kansas, embraces no part of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat., 240); and the treaty concluded September 29, 1865, and proclaimed January 21, 1867 (14 Stat., 687), neither makes nor recognizes a grant of such lands. The effect of the treaty is simply to provide that any rights of the companies designated by the State to build the roads should not be barred or impaired by reason of the general terms of the treaty, but not to declare that such rights existed.
8. The act of Congress of even date with said act (12 Stat., 793), authorizing treaties for the removal of the several tribes of Indians from the State of Kansas, and for the extinction of their title, and a subsequent act for relocating a portion of the road of the appellant (17 Stat., 5), neither recognize nor confer a right to the lands within the Osage country.

APPEAL from the Circuit Court of the United States for the District of Kansas.

This is a bill, filed by the United States against the Leavenworth, Lawrence, and Galveston Railroad Company, to establish its title to certain tracts of land lying within the Osage country in Kansas, which were certified to the governor of Kansas as forming part of the grant made by Congress to that State, to aid in the con-

struction of certain railroads. The court granted the prayer of the bill, and the company appealed.

The treaty with the Great and Little Osage tribes of Indians of June 2, 1825 (7 Stat., 240), contains the following provision:

"ARTICLE II. Within the limits of the country above ceded and relinquished, there shall be reserved to and for the Great and Little Osage tribe or nation aforesaid, so long as they may choose to occupy the same, the following described tract of land."

The land embraces, with other tracts, that mentioned in the first article of a treaty with those Indians, which was concluded September 29, 1865 (14 Stat., 687). That article is as follows:

"The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries * * * * And in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States; and interest thereon at the rate of five per centum per annum shall be paid to said tribe semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws [including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands], but no pre-emption claim or homestead settlement shall be recognized; and, after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States, to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

The words in brackets are an amendment adopted by the Senate 26th June, 1866, which the Indians accepted September 21 of that year. The treaty was proclaimed January 21, 1867.

On the 3d of March, 1863, Congress passed "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State." (12 Stat., 772), the first section of which is as follows:

"That there be, and is hereby, granted to the State of Kansas for the

purpose of aiding in the construction: *First*, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *via* the Ohio City crossing of the Osage river, to the southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka and Santa Fe Railroad, where said road intersects the Neosho river; *second*, of a railroad from the city of Atchison, *via* Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley, every alternate section of land designated by odd numbers for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches: *Provided, further*, That the lands hereby granted for and on account of said road and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of land or bonds may have been made by Congress; *And provided, further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The legislature of Kansas on the 9th of February, 1864, passed an act accepting the grant, and designated the appellant to build

the road from Leavenworth to the southern line of the State, and to receive the grant of land upon the prescribed terms and conditions. Its authorized route passed through the Osage lands, whereof mention is made in the first article of the treaty of 1865, and a map of the definite location of the road was filed in the General Land Office January 2, 1868.

The Commissioner of the General Land Office, by letter bearing date January 21, 1868, directed the register and receiver of the proper office to withdraw from sale the odd numbered sections within ten miles of the line of the road.

The fourth section of the law making appropriations for the Indian department, approved March 3, 1863 (12 Stat., 793), is as follows:

"That the President of the United States be, and is hereby, authorized to enter into treaties with the several tribes of Indians, respectively, now residing in the State of Kansas, for the extinction of their titles to lands held in common within said State, and for the removal of such Indians of said tribes as hold their lands in common, to suitable localities elsewhere within the territorial limits of the United States and outside the limits of any State."

On the 10th of April, 1869, Congress passed the following joint resolution (16 Stat., 55):

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That any *bona fide* settler residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same, in quantity not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however*, That both the odd and even-numbered sections of said lands shall be subject to settlement and sale as above provided: *And provided further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes, in accordance with the provisions of the act of admission of the State of Kansas: *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

Settlers made entries lying within the odd numbered sections, which were set aside and vacated Jan. 16, 1872, by the Secretary

of the Interior, who decided that the appellant had a grant within those lands.

The appellant having constructed its road from its initial point to Thayer, within the ceded territory, and about twenty miles south of its northern boundary, and, desiring to change its previously located route south of that town, the legislature of Kansas, in January, 1871, asked Congress to allow a relocation of the road.

Congress passed an act, approved April 19, 1871, as follows (17 Stat., 5):

"An act to enabled the Leavenworth, Lawrence and Galveston Railroad Company to relocate a portion of its road.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Leavenworth, Lawrence and Galveston Railroad Company, for the purpose of improving its route and accommodating the country, may relocate any portion of its road south of the town of Thayer, within the limits of its grant, as prescribed by the act of Congresss, entitled 'An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March third, eighteen hundred and sixty-three; but not thereby to change, enlarge, or diminish said land grant."

Sept. 21, 1871, the Governor of Kansas certified to the Secretary of the Interior that the road of the appellant had been constructed and equipped as required by the act of Congress of March 3, 1863, and that a map of the road had been duly filed, whereupon certified lists of the odd numbered sections of lands within the railroad limits were made by the proper authority at Washington, and the governor, April 8, 1872, and March 21, 1873, issued to the appellant, patents for the lands mentioned in the bill of complaint.

The case was argued by *Mr. George F. Edmunds* and *Mr. P. Phillips* for the appellant, and by *Mr. Solicitor General Phillips*, *Mr. Jeremiah S. Black*, and *Mr. William Lawrence* for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

This bill was brought by the United States to confirm and establish its title to certain tracts of land, and to enjoin the appellant from setting up any right or claim thereto. These tracts, situate within the Osage ceded lands, in Kansas, and

specifically described in "certified lists" furnished by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to the governor of the State, were subsequently conveyed by the latter to the appellant. Having the force and effect of a patent (10 Stat., 346), the lists passed the title of the United States to the tracts in question, if they were embraced by the grant in aid of the construction of the appellant's road. But the appellee contends that they were not so embraced. If such be the fact, inasmuch as public officers cannot bind the government beyond the scope of their lawful authority, the decree of the circuit court, granting the prayer of the bill, must be affirmed.

The act of Congress of March 3, 1863 (12 Stat., 772), is the starting point in this controversy. Upon it, and the treaty with the Great and Little Osage Indians, proclaimed Jan. 21, 1867 (14 Stat., 687), the appellant rests its claim of title to the lands covered by the patents. It is, therefore, of primary importance, to ascertain the scope and meaning of that act. The parties differ radically in their interpretation of it. The United States maintains that it did not dispose of the Osage lands, and that it was not intended to do so. On the contrary, the appellant insists that, although not operating upon any specific tracts until the road was located, it then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the meanwhile, had become, in the proper sense of the term, public lands. This difference would seem to imply obscurity in the act, but, be this as it may, the rules which govern in the interpretation of legislative grants are so well settled by this court, that they hardly need be reasserted. They apply as well to grants of lands to States, to aid in building railroads, as to grants of special privileges to private corporations. In both cases, the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object, the accomplishment of which it desires to promote, but declines directly to undertake.

The main question in *The Dubuque and Pacific Railroad Company* v. *Litchfield* (23 Howard, 66), was, whether a grant to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, extended to lands above the Raccoon Fork, or was confined to those below it. The court, in deciding it, say:

"All grants of this description are strictly construed against the

grantee; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied."

This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings—one of extension, and the other limitation—they must be accepted in a sense favorable to the grantor.

And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purposes of Congress to confer them. In other words, what is not given expressly or by necessary implication is withheld. (*Dubuque and Pacific Railroad Company* v. *Litchfield*, *supra*; *Rice* v. *Railroad Company*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 120.)

Applying these rules to this controversy, there does not seem to be any difficulty in deciding it. Whatever is included in the exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted in order to determine what is granted. But if the exception and the proviso were omitted, the language used in the body of this act cannot be construed to include the Osage lands.

It creates an immediate interest, and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation, and import a grant *in presenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. (*Railroad Company* v. *Smith*, 9 Wall., 95; *Schulenberg* v. *Harriman*, 21 Wall., 60; 1 Lester, 513; 8 Opin., 257; 11 Opin., 47.) They vest a present title in the State of Kansas, though a survey of lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by rela-

tion has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed. But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers within certain defined limits is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy. (*Rice* v. *Railroad Co.*, *supra*.) Since the land system was inaugurated it has been the settled policy of the government to sell the public lands at a small cost to individuals, and for the last twenty-five years to grant them to States in large tracts to aid in works of internal improvement; but these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations.

Such grants could not be otherwise construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary, because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts. The legislation which reserved it for any purpose, excluded it from disposal as the public lands are usually disposed of, and this act discloses no intention to change the long-continued practice with respect to tracts set apart for the use of the government or of the Indians. As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.

"A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." (1 Bac. Abr., 247.) The treaty of June 2, 1825, secured to the Osages the possession and use of their lands "so long as they may choose to occupy the same," and this treaty was only the substitute for one of an earlier date with equal guarantees.

As long ago as *The Cherokee Nation* v. *Georgia*, 5 Pet., 1, this

court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy until it shall be extinguished by a voluntary cession to the government: and recently, in *United States* v. *Cook*, 19 Wall., 591, that right was declared to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a dominant race constantly pressing on their frontier. With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. This it has indicated a willingness to do: for in 1834 an act was passed (4 Stat., 729, sec. 11) prohibiting, under heavy penalties, a settlement on the lands of an Indian tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*. For all practical purposes they owned it: as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States. In the free exercise of their choice they might hold it forever, and whatever changed this condition or interfered with it violated the guarantees under which they had lived. The United States has frequently bought the Indian title to make room for civilized men—the pioneers of the wilderness—but it has never engaged in advance to do so, nor was constraint (in theory at least) placed upon the Indians to bring about their acts of cession. This grant, however, if it took effect on these lands, carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title of them were granted: but it is equally true if only the fee subject to that right passed. It would be idle to grant what could be of no practical benefit unless something be done which the grantee is forbidden but which the grantor has power to do: and this applies with peculiar force to a grant like this, intended to be immediately available to the grantee.

The lands were expected to be used in the construction of the road as it progressed, but they could neither be sold nor mortgaged so long as a valid adverse right of occupancy attached to them. The grantee was prohibited from negotiating with the

Indians at all; but the United States might, by treaty, put an end to that right. As Congress cannot be supposed to do a vain thing, the present grant of the fee would be an assurance to the grantee that the full title should be eventually enjoyed. This would be in effect a transfer of the possessory right of the Indians before acquiring it—a poor way of observing a treaty stipulation. How could they treat on an equality with the United States under such circumstances? They would be constrained to sell, as the United States was obliged to buy. Although it might appear that the sale was voluntary, it would, in fact, be compulsory. Can the court, in the absence of words of unmistakable import, presume that an act so injurious to the Indians was intended? The grant is silent as to such a purpose: but if it was to take effect in the Osage country on the surrender of the Indian title, it would have so delared. It is true the recognized route of the road passed through that country; but many other roads, aided by similar grants, ran through such reservations, and in no case before this has land included in them been considered as falling within any grant, whether the Indian right was extinguished before or after the definite location of the road. And if Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured an adequate indemnity to them, and sanctioned a delay in locating the road until the surrender of their right should be made. Instead of this, the act contains no provision for them, and contemplates that the road shall be finished as soon as practicable. This is inconsistent with a purpose to grant their land; for they had not proposed to relinquish it, nor had the President encouraged them to do so. In the face of this it is hard to believe that Congress meant to hold out inducements to the company to postpone fixing the route of their road until a contingency should happen which the act did not contemplate. Besides, Congress was bound by every consideration affecting the condition of the Indians to retain their lands within its own control. But it is said that the Indian appropriation bill became a law the same day as the act under consideration, and that it authorized the President to enter into negotiations with the several tribes of Indians residing in Kansas for the extinction of their title and for their removal. This is true; but it does not prove any purpose inconsistent with the policy of the act of 1837 (5 Stat., 135), which contemplates the sale of all Indian lands ceded to the government. If Congress had intended to extinguish

the Osage title for the benefit of the appellant, it would have spoken directly, as it did in the Pacific Railroad act, and not in an indirect way near the end of one of the general appropriation bills. The Congress that made this grant made one eight months before to aid in the construction of a railroad from the Missouri river to the Pacific ocean, and of other roads connecting therewith, in which it agreed to extinguish as rapidly as possible the Indian title for the benefit of the companies.

This was necessary, although their road ran through territory occupied by wild tribes; but this passed through a reservation secured by treaty, and occupied by Indians at least partially civilized. A transfer of any part of it would be wrong; and, as the act does not mention it, there is no reason to suppose that Congress, in making the grant, contemplated the extinction of the Indian title at all. Besides, the avowed object of the provision in the appropriation act was to remove the Indians. If any ulterior hidden purpose was to be thereby subserved, Congress is not responsible for it, nor can it affect this case.

The language used is to be taken as expressing the legislative intention, and the large inference attempted to be drawn from it is not authorized. It does not follow, because Congress sanctioned negotiations to effect the removal of the Indians from Kansas, as a disturbing element of her population, and to procure their land for settlement, that it also contemplated obtaining the title of any tribe in order to convey it by this grant. The policy of removal, a favorite one with the government, and always encouraged by it, looked to the extinguishment of the Indian title for the general good, and not for the special benefit of any particular interest. But the two acts have no necessary connection with each other, because they happened to be approved on the 3d of March. The laws signed by the President that day occupy one hundred pages of the twelfth volume of the statutes.

We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson*, 13 Pet., 498, the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added: "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the

land thus appropriated becomes severed from the mass of public lands: and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it."

It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction.

The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. (*State* v. *Delesdenier*, 7 Tex., 76: *Spaulding* v. *Martin*, 11 Wis., 274.) It applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.

But this case does not rest alone on the words of description in the grant: for the Osage lands are expressly excepted by force of the following proviso:

"That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, *or for any other purpose whatsoever*, be and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case, the right of way only shall be granted, subject to the approval of the President of the United States."

In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive the benefit of them. The proviso has, in our opinion, no doubtful meaning. Attached in substantially the same form to all railroad land-grant acts passed since 1850, it was employed to make plainer the purpose of Congress to exclude from their operation lands which, by reason of prior appropriation, were not in a condition to be granted to a State to aid it in building railroads. It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government,

and saved from a possible grant, is a proposition which will command universal assent. What ought to be done, has been done. The proviso was not necessary to do it, but it serves to fix more definitely what is granted by what is excepted. All lands "heretofore reserved," that is, reserved before the passage of the act, "by competent authority, for any purpose whatsoever," are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers these lands. They had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved, not "to the United States," but to the Osages, they are, therefore, not within the terms of the proviso. This position is untenable. It would leave the proviso without effect, because all the reservations through which this road was to pass were Indian.

This fact was recognized, and the right of way granted through them, subject to the approval of the President. Through his negotiations with the Indians, he secured it in season for the operations of the company. Besides, there were no other lands over which he could exercise any authority to obtain that right. And why grant it by words vesting its immediate enjoyment, unless it was contemplated that the roads would be constructed during the existence of those reservations? But the verbal criticism, that these lands were not, within the meaning of this proviso, reserved "to the United States," is unsound. The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title thereto. In one sense they were reserved to the Indians: but, in another and broader sense, to the United States for the use of the Indians.

Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned. Out of a vast tract of land ceded by the Osages, a certain portion was retained for their exclusive enjoyment, as long as they chose to possess it.

The government covenanted that they should not be disturbed, except with their voluntary consent first obtained: and a grant of their land would be such a manifest breach of this covenant, that Congress, in order to leave no possible room for doubt, specially excepted it by the proviso. A construction which would

limit it to land set apart for military posts and the like, and deny its application to that appropriated for Indian occupation, is more subtle than sound. This proviso, or rather one couched in the same language, was the subject of consideration by this court, and received a liberal interpretation, instead of the technical and narrow one claimed for it by the appellant. *Wolcott* v. *Des Moines Navigation Company*, 5 Wall., 681, was a controversy concerning the title to certain lands, which, it was conceded, were covered by a grant, unless excluded by the proviso thereunto annexed. The court held that they were excluded, although they had not been reserved "to the United States." They had been, in fact, reserved by the executive officers of the government, upon a mistaken construction of a prior grant made by the United States to the State of Iowa. This decision was re-affirmed in *Williams* v. *Baker*, 17 Wall., 144.

The scope and effect of the act of 1863, cannot, in our opinion, be mistaken.

The different parts harmonize with each other, and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and Congress was willing to aid her to build them, by a grant of a part of the national domain, in a condition at the time to be disposed of. It was accordingly made of alternate sections of land within ten miles on each side of the contemplated roads. Formerly, lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and, at the date of this act, the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those granted, and within twenty miles of the line of the road. Having thus given lands in place and by

way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it.

The indemnity clause has been insisted upon. We have before said that the grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them. If the company did not obtain all of them within the original limit, by reason of the power of sale or reservation retained by the United States; it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit; and the attempt to give this effect to the clause receives no support, either in the scheme of the act or in anything that has been urged by counsel. It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the ten-mile limit, or enlarging the one already made. Instead of this, the words employed show clearly that its only purpose is to give sections beyond that limit, for those lost within it by the action of the government between the date of the grant and the location of the road. This construction gives effect to the whole statute, and makes each part consistent with the other. But, even if the clause were susceptible of a more extended meaning, it is still subject to, and limited by, the provisos which excludes all lands reserved at the date of the grant, and not simply those found to be reserved when the line of the road shall be definitively fixed. The latter contingency had been provided for in the clause; and, if the proviso did not take effect until that time, it would be wholly unnecessary. And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant: and it makes no difference whether or not they subsequently became a part of the public lands of the country.

But the appellant claims that these lands were subjected to this grant by virtue of the Senate amendment to the Osage treaty, concluded September 29, 1865, and proclaimed in 1867. If the amendment has this effect, it is entirely inconsistent with the purposes of the treaty. The United States had not made an abso-

lute, or a contingent grant of the lands. There was, manifestly, no reason why the Osages should bestow a gratuity on the appellant; and the treaty itself, as originally framed, disclaimed such an intention. Whatever they did give was limited to persons from whom they had received valuable services, and they so expressly stated. Their annuities had ceased. Confessed poverty, and the desire to improve their condition, induced them to negotiate. They had a surplus of land, but no money. The United States, in pursuance of a long-settled policy, desired to open that land to settlement. Induced by these considerations, the parties concluded a treaty, which was submitted to the Senate for its constitutional action.

By the first article the Osages ceded, on certain conditions, a large and valuable part of their possessions. The United States was required to survey and sell it on the most advantageous terms, for cash, in conformity with the system then in operation for surveying and selling the public lands, with the restriction that neither pre-emption claims nor homestead settlements were to be recognized. The proceeds, after deducting enough to repay advances and expenses, were to be placed in the treasury to the credit of the "civilization fund," for the benefit of the Indian tribes throughout the country.

The moneys arising from the sale of the lands ceded by the second article, were for the exclusive benefit of the Osages; but the relation of the United States to the property in each case is the same. And it can make no difference that the trust in one is specifically set forth, and in the other, is to be ascertained from the general scope of the language. It is an elementary principle that no particular form of words is necessary to create a trust. In neither case is the government a beneficiary. In both, the fund is to be applied to promote the well being of the Indians, which it has ever been the cherished policy of Congress to secure.

Neither party contemplated that a part of the lands was to be given to a corporation, to aid in building a railroad. And, if the appellant gets any of them, it is manifest that the treaty cannot be carried into effect, nor can the trusts therein limited and declared, be executed. As neither the act of 1863, nor the treaty in its original shape, grants the tracts in controversy, the inquiry presents itself as to the effect of the amendment.

The provision on this subject, with the amendment in brackets, reads as follows:

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws [including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands]; but no pre-emption claim or homestead settlement shall be recognized."

Tested by its literal meaning and grammatical structure, this amendment relates solely to the survey and sale of the lands, and cannot be extended further. It was doubtless so explained to the Indians when they accepted it. But, obscure as it is, and indefinite as is its purport, it was intended to do more than declare what laws should be observed in surveying and selling the lands. But whatever purpose it was meant to serve, it obviously does not, *proprio vigore*, make a grant. To do this, other words must be introduced; but treaties, like statutes, must rest on the words used—"nothing adding thereto, nothing diminishing."

In *Rex* v. *Burrell* (12 Ad. & Ell., 468), Patterson, J., said: "I see the necessity of not importing into statutes, words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." Courts have always treated the subject in the same way, when asked to supply words in order to give a statute a particular meaning, which it would not bear without them. (*Rex* v. *Poor*, Law Comm'rs, 6 Ad. & Ell., 7; *Everett* v. *Wells*, 2 Scott (N. C.), 531; *Green* v. *Wood*, 7 Q. B., 178.)

It is urged that the amendment, if it does not make a grant, recognizes one already made. It does not say so; and we cannot suppose that the Senate, when it advised and consented to the ratification of the treaty with that, among other amendments, intended that the Indians, by assenting to them, should recognize a grant that had no existence. Information was, doubtless, communicated to that body that there were grants of some of the ceded lands which might interfere with the absolute disposal of them, required by the treaty. If there were such grants, it was obviously proper that the treaty should be so modified as not to conflict with rights vested under them. But the Senate left that question to the proper tribunal, and declared, in effect, that such grants, if made by existing laws, should be respected in the disposition of the lands. On this interpretation, the amendment in question is consistent with the treaty. But if that contended for by the appellant be correct, the treaty is practically defeated. If no such grant had been made, lands would be taken from the

Osages without either their consent or that of Congress, and appropriated to building railroads, for no one can fail to see that interested outside parties, having access to these ignorant Indians, would explain the amendment as a harmless thing. In concluding the treaty, neither party thereto supposed that any grant attached to the lands, for, as we have seen, all were to be sold, and the fund invested. Did the Senate intend to charge them with a grant, whether it had really been made or not? If so, the treaty would have been altered to conform with so radical a change in its essential provisions, by accepting the lands covered by the grant, instead of directing them to be sold. Why sell *all*, if the *status* of a part was fixed absolutely by the amendment? In such a case, justice to the companies required that they should have the lands granted to them. The United States should, also, to this extent, be relieved of its trust. But, if the amendment was designed to operate only in the contingency that a grant had been made, there was no occasion to alter the treaty, further than to say, as it now substantially does say, that the companies, if entitled to the lands, should get them. No objection could justly be made to such a provision. It preserved vested rights, but did not create new ones. Without solving the problem whether or not a grant had been made, it decided that the rights of the companies, if any they had, should not be barred or impaired by reason of the general terms of the treaty. It is argued that the Osages are not injured by taking a portion of their country, as an enhanced value would be given to the remainder by the construction of the appellant's road. This is taking for granted what may or may not be true. Besides, they cannot be despoiled of any part of their inheritance upon such a fallacious pretence, and they chose to have *all* their lands sold. To this the United States assented by positive stipulation. We do not think that it was the intent of the amendment to annul that stipulation, or to construe statutes upon which the title of the appellant depends. Its office was to protect rights that might be asserted, independently of the treaty, but not to declare that any such rights existed.

The Thayer act, as it is called, is invoked; but it can have no effect upon this case. It was passed for the sole purpose of enabling the company to relocate its road; and a false recital in it cannot turn the authority thereby given into a grant of lands, or a recognition of one. Especially is this so, when it expressly

leaves the rights of the appellant to be determined by previous legislation. Besides this, these lands were then selling under a joint resolution, and it cannot be presumed that the Congress of 1871 intended to change the disposition of them, directed by the Congress of 1869.

It is urged that parties have loaned money on the faith that the lands in question were covered by the grant.

This is a subject of regret, as is always the case when a title, on the strength of which money has been advanced, fails. It is to be hoped that the security taken upon the other property of the company will prove to be sufficient to satisfy the claims of the holders of its bonds. But whether this be so or not, we need hardly say that the title to lands is not strengthened by giving a mortgage upon them; nor can the fact that it has been given, throw any light upon the prior estate of the mortgagor.

Upon the fullest consideration we have been able to bestow upon this case, we are clearly of opinion that there is no error in the record. *Decree affirmed.*

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE STRONG, dissenting.

I do not agree with the majority of the court in this case. In my judgment, the land in controversy passed, by the grant of Congress, to the State of Kansas, and by the patents of the State, to the defendant. In reliance upon the title conferred, a large portion of the money was raised with which the road of the company was built. I cannot think that the legislation of Congress, and the subsequent action in conformity to it of the Department of the Interior and of the State of Kansas, deceived both company and creditors.

The act of Congress appears to me to be singularly plain and free from obscurity. "There be and is hereby granted to the State of Kansas," are the words used for the purpose of aiding in the construction of a railroad and telegraph between certain places, alternate odd sections of land along each side of the road and its branches. These words were sufficiently comprehensive to pass whatever interest the United States possessed in the lands. If there were any limitation upon their operation, it lay either in the character of the property granted, as lands in the occupation of Indian tribes, or in the subsequent reservations of the act.

The road with which the present company is concerned was to

be constructed through the tract situated in the southern part of the State, known as the Osage reservation. Upon this tract the Osage tribes of Indians resided under the treaty of June 2, 1825, by which the tract was reserved to them so long as they might choose to occupy it. (7 Stat., 240.) The fee of the land was in the United States, with the right of occupation, under the treaty, in the Indians. Until this right was relinquished, the occupancy could not be disturbed by any power, except that of the United States. The only right of Indian tribes to land anywhere within the United States is that of occupancy. Such has been the uniform ruling of this court; and upon its correctness the government has acted from its commencement. In *Fletcher* v. *Peck*, which was here as long ago as 1810, it was suggested by counsel on the argument that the power of the State of Georgia to grant did not extend to lands to which the Indian title had not been extinguished; but Mr. Chief Justice Marshall replied, that the majority of the court were of opinion that the nature of the Indian title, which was certainly to be respected until legitimately extinguished, was not such as to be absolutely repugnant to *seisin* in fee on the part of the State. (6 Cranch, 121, 142, 143.)

In *Clark* v. *Smith*, 13 Pet., 200, decided many years afterwards, Mr. Justice Catron, speaking of the grants made by North Carolina and Virginia of lands within Indian hunting grounds, said that these States "to a great extent paid their officers and soldiers of the Revolutionary war by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States, but others. The ultimate fee encumbered with Indian right of occupancy was in the crown, previous to the Revolution, and in the States of the Union afterwards, subject to grant."

And in the recent case of the *United States* v. *Cook*, where replevin was brought for timber cut and sold by Indians on lands reserved to them, the court said that the fee of the land was in the United States, subject only to a right of occupany in the Indians; that this right of occupancy was as sacred as that of the United States to the fee; but it was "only a right of occupancy," and "that the possession, when abandoned by the Indians, attaches itself to the fee without further grant." (19 Wall., 593.)

It would seem, therefore, clear that there was nothing in the character of the land as an Indian reservation which could prevent the operation of the grant of Congress, subject to the right of

occupancy retained by the Indians: so that, when this right should be relinquished, the possession would inure to the grantee.

It is true that the United States, acting in good faith, could only acquire the relinquishment of the Indian right of occupancy by treaty: and so the authors of the bill for the grant understood. The representative of Kansas in the Senate of the United States, by whom the bill was introduced, preceded its presentation with a notice of his intention to introduce at the same time a bill for extinguishing the Indian title in Kansas, and the removal of the Indians beyond her borders. The two bills were introduced within a few days of each other: and both became a law on the same day. The one for the extinguishment of the Indian title was incorporated into the appropriation bill, and authorized the President to enter into treaty for that purpose with the several tribes of Indians then residing in the State, and for their own removal beyond its limits.

Pursuant to this authority, a treaty was subsequently made with the Osage Indian tribes: and, before the line of the road of the defendant company was definitely fixed, their right of occupancy to the lands in controversy was extinguished.

I proceed to the next inquiry: Was there anything in the reservations of the act which limited the operation of the general words of grant?

There were two reservations in the act—one general and the other special, the latter being in the proviso. The general reservation only excepted from the operation of the grant lands which, at the time the line of the road and its branches was definitely fixed, were sold or reserved, or to which the right of pre-emption or homestead settlement had then attached.

The sections granted could only be ascertained when the route of the road was established: but, as this might take years, the government did not in the meantime withhold the lands from settlement and sale upon any notion that the route might possibly pass through or near them. It kept the lands generally open to the settler or pre-emptor, and subject at all times to appropriation for public uses; and the object of the general reservation mentioned was to provide for the possible acquisition of interests in this way to lands falling within the limits of the grant.

When they did so fall, other lands in their place were to be selected. It was only when the route was definitely fixed that the right of sale or settlement or reservation ended, and the title pre-

viously floating attached to the land subject to the grant. This was the construction adopted by the land department, and was the one which most fully fitted in with the general policy of the government in other cases in the disposition of the public lands.

In 1856 the question arose before the Department of the Interior as to the construction of a similar provision in the act of Congress of May 15, of that year, granting lands to the State of Iowa, and was submitted to the then attorney general, Cushing; and he replied that the act contemplated that the United States should retain power to convey within all the possible limits of the grant, either by ordinary sale or on pre-emption, up to the time when the lines or routes of the road were definitely fixed. (8 Op. Att'y Gen., 246.)

Whilst the operation of the grant may, on the one hand, be thus limited by what occurs subsequent to the act, it may, on the other hand, be enlarged by subsequent removal of existing impediments; such as reservations, contracts of sale, and initiatory steps for acquiring rights of pre-emption and homestead settlement. The question in either case respects the condition of the land at the time the line or route of the road is definitely fixed.

If a previous reservation, whether existing before the act or made afterwards, be then relinquished, or a previous contract of sale or right of pre-emption or homestead settlement be then abandoned, the grant will, in my judgment, take the land. Such I understand to be the ruling of the land department; and it is difficult to perceive any reasons of public policy which should prevent the land in such cases from passing under the grant.

The special reservation contained in the proviso to the act in terms applies only to lands reserved *to* the United States. There have been, from the outset of the government, reservations of lands for public uses of various kinds, through which a right of way for a public highway or railroad might well be granted, subject to the approval of the President, who would see that the property was not injured. To protect lands thus situated, or lands reserved to the government for similar public purposes, the proviso applied. The lands now in controversy, occupied by the Osage Indians, were set apart to them: they were not reserved *to* the United States in any sense in which those terms can be properly used.

The treaty of 1825, under which the lands were held, distinguishes between reservations *to* the Indians and reservations to the United States, and speaks of both in the same article. (Art. 2.)

The argument of the majority of the court on this head appears to me to defeat itself. The proviso, it is contended, excluded from the operation of the grant any of the lands occupied by the Indians; it would have been a great breach of faith, it is said, to apply the grant to any of those lands. But at the same time, it is admitted that the act contemplated a right of way through those lands for the road. It is difficult to perceive how taking the lesser quantity of the land for a right of way, if done without treaty, could have been any less a breach of faith; and if done by treaty, the taking might as well have extended to the whole lands. As the Congress which made the grant also authorized the President to obtain an extinguishment of the right of occupancy from the Indians, it would seem that there ought not to be any greater reproach in providing for the acquisition of the lands, than in providing for the acquisition of the right of way.

But, aside from this consideration, if the conclusion were at all doubtful, which I do not think it is, there is a rule applicable to the construction of provisos in a grant, which should determine the question here; and that is, that they must be strictly construed. In *United States* v. *Dixon*, Mr. Justice Story stated, that it was "the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso craves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." (15 Pet., 165.) I submit confidently that the proviso here thus construed would not take the lands in controversy out of the enacting clause of the act.

The proviso itself is a formula used in nearly all land grants; and is inserted out of abundant caution, even where there are no special reservations on which it can operate. But in this case there was the military reservation at Fort Gibson, which would have passed under the grant but for the proviso.

There is, then, in my judgment nothing in the reservations contained in the act which should prevent the operation of the granting words upon the lands within the Osage reservation. But, were there any doubt whether the act was intended to cover these Indian

lands, that doubt would be removed by the recognition of the grant in the treaty with the Indians and the subsequent legislation of Congress. The treaty was adopted on the 29th of September, 1865. (14 Stat., 687, 692.) It provided that, in consideration of the sale of the lands, the United States should pay $300,000, to be placed to the credit of the Indians in the Treasury of the United States; and should pay interest thereon in money, clothing, provisions, and such articles of utility as the Secretary of the Interior might from time to time direct; and it declared, as originally drawn, that the lands should be surveyed and sold as public lands are surveyed and sold under existing laws. But when the treaty was under consideration by the Senate, it was amended in this particular, so as to conform to the act granting the lands to Kansas. That act provided that the alternate sections reserved from the grant, within ten miles of the road or its branches, should be sold at double the minimum price of the public lands. The amendment inserted in the treaty added, immediately after the provision for the survey and sale under existing laws, the words "including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands," so that the provision required that the sale of the lands of the Osage Indians should be made in accordance with existing laws, including among them the one granting lands to Kansas. Here is a clear recognition that that act was intended to cover the Indian lands. This recognition was not limited merely to the Senate, for the attention of both houses of Congress was called to the subject by the appropriation which the treaty required and Congress made.

Again: In January, 1871, Congress passed an act authorizing the company, for the purpose of improving its route and accommodating the country, to relocate any portion of its road south of the town of Thayer, within the limits of its grant as prescribed by the act of Congress. The town of Thayer was situated within the boundaries of the Osage lands. The act also declared that the company should not thereby—that is, by the relocation—change, enlarge, or diminish the land grant; and this declaration is held by the majority of the court to destroy the effect of the act as a recognition of the grant of the Indian lands. How it does so I am unable to see. When it declares that the company may alter its road south of a particular point within the limits of its grant the act does admit that the company has a grant, and that the grant lies south of that point; and this admission is not affected

by the further declaration that the company shall not thereby change, enlarge, or diminish the grant. But I will not pursue the subject further. The conclusion reached by the court appears to me to work great injustice. The government of the United States, through one set of its officers, after mature deliberation and argument of counsel, has issued its certificates or lists that the lands in controversy were covered by the grant, and has thus encouraged the expenditure of millions of money in the construction of a public highway by which the wilderness has been opened to civilization and settlement: and then, on the other hand, after the work has been done and the money expended, has, with another set of officers and all the machinery of the judiciary, attempted to render and has succeeded in rendering utterly worthless the titles it aided to create and put forth upon the world. Such proceedings are not calculated, in my judgment, to enhance our ideas of the wisdom with which the law is administered or of the justice of the government.

I am of opinion that the decree should be reversed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* UNITED STATES, appeal from the Circuit Court of the United States for the District of Kansas, is, in its essential features, the same as the preceding case, and was argued by the same counsel.

MR. JUSTICE DAVIS delivered the opinion of the court. The decision in *Leavenworth, Lawrence and the Galveston Railroad Company* v. *United States*, *supra*, controls this case. Each company claims a grant of land within the Osage reservation. This case involves substantially the same questions as the other, with this difference, that the act of July 25, 1866 (14 Stat., 289), under which the appellant claims, was passed after the amendment had been advised by the Senate, and the treaty was beyond its control.

In any aspect of this case, the appellant cannot recover. The amendment refers only to existing laws, and does not apply to the act of 1866, as it was not then in force. It is true that the bill, which subsequently became a law, was pending at the same time as the treaty: but, if the Senate intended the amendment to apply not only to existing, but to contemplated grants, language appropriate to such a purpose would have been used. This

remark applies to Congress also; for, if it meant, notwithstanding the provisions of the treaty, to grant these lands, words would have been employed to include them, or, at least, take them out of the proviso. But the result is the same, whether the act is to be treated as taking effect before or after the treaty became operative by the proclamation of the President, on the 21st of January, 1867. If it was in force for all purposes on the day it passed, then the Indian title even was not extinguished, as the treaty had not been ratified. But if it be considered as in any sense taking effect after the ratification, then the claim of the appellant is defeated by the terms of the treaty. These lands, having been thereby set apart to be surveyed and sold for the benefit of the Indians, were "otherwise appropriated," as much as they had been before the treaty was concluded, and were consequently reserved within the meaning of the excepting clause in the act. *Decree affirmed.*

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, and MR. JUSTICE STRONG dissented.

NOTE.—No one but the Attorney General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts, on which such a patent is founded

The United States district attorney cannot bring the suit in his own name. (*United States* v. *Samuel R. Throckmorton et al.*) U. S. Supreme Court, October Term, 1878.

THE UNITED STATES, appellant, *v.* THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

No. 146—October Term, 1878.

1. There are no lateral limits to the grant of lands made to the defendants by act of July 2d, 1864 (13 Stat. at Large, 356, sec. 19), within which selections of lieu lands are confined, in this respect differing from other grants to railroads
2. By the 19th section of the act, there is granted, "to the amount of ten alternate sections per mile, on each side of said road, on the line thereof." *Held*—

   1. That the company is not confined to the selection of land directly opposite to each section of twenty miles, but may select along the whole line of the road to make up quantity.

II. That land could not be selected on the north side of the road in lieu of lands deficient on the south side thereof.

III. That lands may be taken along the general direction or course of the line of the road, within lines perpendicular to its terminus at each end.

3. The amendatory act of July 2d, 1864, enlarging the grant of July 1st, 1862 (12 Stat. at Large, 489), gave the Union Pacific Railroad Company the superior right to the alternate sections within twenty miles of its road.

4. A bill by the United States to have patents set aside as illegally issued, is bad on demurrer, if the lands to be affected are not described or identified.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity, brought by the United States to annul certain patents issued by them to the Burlington and Missouri River Railroad Company, for lands situated in Nebraska, amounting in the aggregate to one million two hundred thousand acres. It is founded upon alleged errors made by the land department in the construction of the statute under which the patents were issued, and presents several interesting questions for determination. These questions, however, are so fully considered by the presiding justice of the circuit court, and the views we entertain are so clearly stated in his opinion, that we can add but little to what he has said.

By the 18th section of the act of Congress of July 2d, 1864, amending the act of 1862, "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," the Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, was authorized to extend its road through the then Territory of Nebraska, from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main line of the Union Pacific Railroad, or with that part of it which runs from Omaha to the said meridian. By the 19th section of the act, there was granted to the company, for the purpose of aiding in the construction of this road, every alternate section

of public land (excepting mineral land) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed.

In April, 1869, this railroad company was authorized to assign and convey to a company to be organized under the laws of Nebraska, all the rights, powers and privileges granted to it by the act of 1864, subject to the same conditions and requirements. The defendant company was thereafter organized and incorporated under the laws of Nebraska, with power to build the railroad mentioned: and to it the Iowa company made the assignment authorized. The new company thereupon proceeded to construct the road from Plattsmouth, on the Missouri river, to Fort Kearney, where it connected with the road of the Union Pacific, a distance of two hundred miles. The work was commenced on the 4th of July, 1869, and was completed on the 2d of September, 1872.

By the 20th section of the act of 1864, whenever twenty consecutive miles of the road should be completed in the manner prescribed, the President of the United States was to appoint three commissioners to examine and report to him in relation to it: and if it should appear that the twenty miles were completed as required, then, upon the certificate of the commissioners to that effect, patents were to be issued to the company for land on each side of the road to the amount designated. Such examination, report and conveyance were to be made, from time to time, until the entire road should be completed.

In compliance with this provision, as each section of twenty miles of the road was completed, commissioners were appointed by the President to examine and report upon it: and, upon their reports, patents were issued for land within twenty miles from the road. But within that distance, on the north and south side, portions of the land, amounting to one million two hundred thousand acres, had been sold, reserved, or otherwise disposed of by the United States, or homestead or pre-emption claims had attached to it at the time the line of the road was definitely fixed. Thereupon, the company made application to the land department for land outside of the limit of twenty miles, in lieu of the land thus disposed of; and accordingly, in 1872, five patents for

such land were issued. It is to annul these patents that the present bill was filed, their validity being called in question on the ground that the act of Congress limited its grant to land within twenty miles of the road.

The line of the road was definitely located in June, 1865, and land embracing the odd sections, within the limit of twenty miles, was withdrawn from sale in July following; but land outside of this limit, which was subsequently patented to the company, was not withdrawn until May, 1872. Between the definite location of the road in 1865, and the withdrawal of the land outside of the twenty-mile limit in 1872, the greater part of the land opposite the eastern sections of the road was disposed of by the government; and, therefore, most of the land covered by the patents lies opposite the western sections. This constitutes another ground of the alleged invalidity of the patents, it being contended that the grant was to aid in the construction of each section of the twenty miles, taken separately, and that it must be of land directly opposite to such section.

By the act of 1862, the Union Pacific Company was authorized to construct a railroad from a point on the one-hundredth meridian of longitude west of Greenwich to the western boundary of Nevada Territory, the initial point of which was to be fixed by the President. To aid in the construction of this road a grant was made to the company of five alternate sections of land, designated by odd numbers on each side of the road, along its line, within the limit of ten miles. By the same act the company was also authorized to construct a road from a point on the western boundary of the State of Iowa, to be fixed by the President, to the one-hundredth meridian of longitude, upon the same terms and conditions prescribed for the construction of the Union Pacific line. By the act of 1864 the grant of five sections was increased to ten sections, and the limit within which they were to be taken was increased from ten to twenty miles. This enlargement of the grant was not made by the terms of a new and additional grant, but by enacting that the numbers five and ten in the original act should be stricken out and the numbers ten and twenty substituted in their places.

In March, 1864, the President fixed the initial point of the new road near Omaha, and thereupon the company commenced its construction. This initial point was distant about twenty miles only from the defendant company's road, and the roads of the two

companies ran west on nearly parallel lines, so close that the grants to both could not be satisfied. The Union Pacific claimed the whole of the odd sections between the ten-mile and the twenty-mile limit, and its claim in this respect was recognized by the land department by the issue of patents or certificates for patents for them. The defendant thereupon selected land more than twenty miles distant from the line of its road, in order to make up the entire number of sections granted to it. It is now contended by the government, that the act of 1864 did not enlarge the grant made in aid of the Omaha branch by the original act; and that the defendant was entitled to the odd sections outside of the ten-mile limit and could not take land elsewhere in lieu of them; and that if the act did enlarge the grant, the defendant, having received its grant by the same act, was entitled to one-half of the land within the enlarged limit; and could not, therefore, take land to that amount elsewhere. Assuming this construction of the act of 1864 to be correct, these objections are also urged against the validity of the patents.

It also appears by the allegations of the bill that land to the extent of one hundred and fifty thousand acres, which should have been taken, if at all, on the south side of the road, was selected on the north side of the road beyond the twenty-mile limit, and included in the patents to the defendant; and this fact is made an objection to the validity of the patents as to the land thus taken.

Upon the several grounds stated, the United States ask a decree for the cancellation of the patents; or, if that cannot be granted, a decree that they be declared void as to a portion of the land embraced by them.

The position that the grant to the company was only of land situated within twenty miles of the road, finds no support in the language of the act of Congress. That simply declares that a grant is made of land to the amount of ten sections per mile on each side of the road. The grant is one of quantity, and the selection of the land is subject only to these limitations: 1st, that the land must be embraced by the odd sections; 2d, that it must be taken in equal quantities on each side of the road; 3d, that it must be on the line of the road; and 4th, that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely loca-

ted. There is here no limitation of distance from the road within which the selection is to be made, and the court can make none. The objection, undoubtedly, has its suggestion from the fact that nearly all, perhaps all other grants of land in aid of the construction of railroads prescribe a lateral limit within which the land is to be selected; and provide for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within such limit between the date of the act and the location of the road. The reasons for the omission in this case are obvious. The road was to run through a country already partially settled, and likely to be more settled before the line of the road would be definitely located. It was doubtful, therefore, whether any considerable portion of the amount of land intended for the company would be found undisposed of within twenty miles of its road. Moreover, the road of the Union Pacific was to be constructed within a short distance, and its grant would necessarily preclude a selection of land by the defendant if the latter's grant were confined within a similar lateral limit. Congress gave no government bonds to the company; its aid consisted merely in the grant of land, and that this might not fail, it allowed the land to be taken along the line of the road wherever it could be found. And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.

The position that the grant was in aid of the construction of each section of twenty miles taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional to apply for it then or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side

of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section. When lateral limits are assigned to a grant the land within them must of course be exhausted before land for any deficiency can be taken elsewhere. And when no lateral limits are assigned the land department of the government in supervising the execution of the act of Congress should, undoubtedly, as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road.

That the amendment of the act of 1864, enlarging the grant of 1862 to the Union Pacific Company, was intended to apply to the grants made to all the branch companies, there can be no doubt. All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place the Union Pacific Company and all its branch companies upon the same footing as to land, privileges, and duties to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.

Now, the enlargement of the grant by the act of 1864 is not made, as already stated, by words of a new and additional grant, but simply by altering the number of sections granted and the distance from the road within which they are to be taken. The numbers in the first act, says the amendment, shall be stricken out and larger numbers substituted, so that the act of 1862 must thenceforth be read, at least as against the government and parties

claiming under concurrent or subsequent grants, as though the larger numbers had been originally inserted in it. The Burlington and Missouri Railroad Company received its grant from the same act which declared that the act of 1862 in its grant to the Union Pacific should be thus read: it must, therefore, take its rights to the land subject to the claim of that company.

"This view," as the presiding justice of the circuit court justly observes, "would commend itself to Congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits, while the other construction allows the Burlington and Missouri Company to get all it could under any circumstances, the other road losing what the latter took within the lap. This comes out of the fact that the Burlington and Missouri Company was not confined within any lateral limits, while the Union Pacific could not go without its twenty-mile limit to make up deficiencies." "Besides," he adds, "both of these roads have acquiesced in the construction given and acted on by the United States, the officers of the government having prescribed it as the one which should govern all their rights, the patents have been issued under it for the full amount of all the land which could be so claimed under both grants: and innocent purchasers have no doubt become owners of much of the land patented to the Union Pacific Company: and it is certainly all mortgaged, so that an incalculable amount of injustice would be done by holding all this void and setting aside the patents."

It only remains to notice the further objection to the patents, that land to the amount of one hundred and fifty thousand acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true the act of Congress contemplates that one-half of the land granted should be taken on each side of the road: and the department could not enlarge the quantity on one side to make up a deficiency on the other. But the answer to the objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents cannot be adjudged invalid as to any land not identified, so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy: it

certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees. It is sufficient, however, that it makes no case for relief by the present bill.

Decree affirmed.

UNION PACIFIC RAILROAD COMPANY *v.* JAMES R. WATTS.

U. S. Circuit Court.—District of Nebraska, 1872.—2 Dillon, 310.

Union Pacific Railroad Company.—Construction of Land Grant.

1. The land grant to the Union Pacific Railroad Company (12 Stats. at Large, 492, sec. 3), excepts, *inter alia*, lands to which *homestead claims* had attached at the time the line of the railroad was definitely fixed: *Held*, that this exception did not operate in favor of a sham and fraudulent homestead claim.
2. What would constitute such a claim, illustrated.

Before DILLON and DUNDY J. J.:

Ejectment for one hundred and sixty acres of land. No questions arise on the pleadings. The plaintiff introduced a patent for the land in dispute, dated February 23, 1871, made under the act incorporating the plaintiff, July 1, 1862 (12 Stats. at Large, 489), and rested.

Defendant was in actual possession, and claimed that this land was excepted out of the grant to the plaintiff, of July 1, 1862 (12 Stats. at Large, 492, sec. 3), because before the definite location of the plaintiff's line of road there was a homestead right thereon in favor of one Peter Hugus.

On the trial the defendant offered evidence of the filing of papers by Hugus, December 5, 1863, to obtain a homestead right under the act of Congress in that behalf. Plaintiff, in rebuttal, produced the said Hugus as a witness, who testified, in substance, as follows:

"I am same person that, on December 5, 1863, made a homestead filing on this quarter-section; never made but one such filing; I had never seen this land before I made that filing; I made it as a great many others made them in those days; four of us agreed to build one house on the four corners of the section; two of them abandoned the scheme, and when they did, I gave the whole thing up, and we never went on to this land; never made

any improvement upon it: I lived in Omaha then, and ever since, and never moved on to this land, and never saw it.

"Afterwards, Mr. Davis, land agent of the Union Pacific Railroad Company, called upon me, and refunded what I had paid, about $10, and I relinquished my right to the company; I never had any intention of improving this land or of moving on to or entering it; I did not know where it was, except that it was between the Elkhorn and Platte rivers: the land office at the time was in Omaha."

On cross-examination he said:

"I was a citizen of the United States, and a resident of Nebraska: I filed upon it with intention to procure it in the same manner as other people did at that time: Mr. Davis, agent of the Union Pacific Railroad Company, called upon me to relinquish; he paid me the amount I paid United States local land officers to make the filing, about $10."

The grant of public lands by Congress to the Union Pacific Railroad Company (12 Stats. at Large, 492, sec. 3), is "of five alternate sections per mile on each side of said railroad, on the line thereof, * * * not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption *or homestead claim may not have attached* at the time the line of said road is definitely fixed."

Mr. Poppleton and *Mr. Wakeley* for the plaintiff.

Mr. Baldwin for the defendant.

DILLON, Circuit Judge:

The land in question is embraced in the patent to the plaintiff, introduced in evidence, dated February 23, 1871, and this gives the plaintiff the legal title thereto, unless the same was land which had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim may have attached at the time the line of the plaintiff's road was definitely fixed.

The defendant claims that the land was excepted out of the grant made by the act of July 1, 1862, because before and at the time the line of the plaintiff's road was definitely fixed, there was a homestead claim thereto in favor of one Peter Hugus.

If you find, from the evidence, that Peter Hugus never saw this land, never made any improvements thereon, and never intended to make any, or to comply with the provisions of the homestead

act as to settlement, occupation, and improvement of it, and never did anything, except to file an application for an entry, and that he afterwards relinquished all right to the plaintiff, then we instruct you, as a matter of law, that no homestead claim attached to the land in favor of Hugus, and that the land would be embraced in the grant to the plaintiff made by the said act of July 1, 1862, and conveyed by the patent to the plaintiff, which has been introduced in evidence.

DUNDY, J., concurred.

NOTE.—The jury found for the plaintiff, and the court rendered judgment upon the verdict and signed a bill of exceptions.

SIOUX CITY AND PACIFIC RAILROAD COMPANY *v.* UNION PACIFIC RAILROAD COMPANY.

U. S. Circuit Court, District of Nebraska, 1876.—4 Dillon, 307.

Union Pacific Railroad Company.—Construction of its Land Grant and that of the Sioux City Branch.

Where the land grant of Congress to the Union Pacific Railroad Company and the Sioux City branch (12 Stats. at Large, 489; 13 *ib.*, 356), conflict, and the limits of the respective grants overlap each other, and lands in the common territory were patented to the two companies jointly as tenants in common: *Held*, upon a construction of the legislation of Congress in this regard, that the patent was rightly issued, and that neither company was the exclusive owner of the said lands, and a partition was decreed.

Before DILLON, Circuit Judge:

In execution of the legislation of Congress whereby the complainant and defendant were granted public lands in aid of the construction of their respective roads, a joint patent was granted on the 25th of March, 1873, of thirty thousand seven hundred and ninety and forty-one hundredths acres of land lying between the ten and twenty-mile limit of the land grant of the defendant to complainant and defendant. There were also patented jointly to the two companies twenty thousand nine hundred and four acres within the ten-mile limit of the defendant company.

This bill is filed to compel the Union Pacific to convey to the Sioux City and Pacific the one-half of such lands, the latter com-

pany claiming all the land embraced in said patents. The cross-bill asks a decree awarding the whole of said lands to the Union Pacific, and that the complainant be compelled to convey accordingly.

It is stipulated that the original and cross-suits shall be heard as one; that the admissions of the answers in each shall be taken as true in both, and some further facts are agreed upon as evidence in both causes.

The legislation out of which this controversy springs are the acts of 1862 and 1864. Section 1, act of 1862 (12 Stats. at Large, 489), empowered the Union Pacific to build a railroad from a point on the one-hundredth meridian of west longitude to the western boundary of Nevada Territory. Section 3 granted land in aid of the construction of said road "to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of the said road." Section 14 authorized the construction of the so-called Sioux City and Iowa branches "upon the same terms and conditions in all respects as are contained in this act for the construction of the railroad and telegraph mentioned." Section 9 contains the grant of bonds and lands to the Leavenworth, Pawnee and Western Railroad Company of Kansas, now known as the Kansas Pacific, and to the Central Pacific of California.

The grants are made in the exact language employed in the grants to the Iowa and Sioux City branches, viz.: they are authorized to build "upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph line first mentioned."

Section 13 places the Hannibal and St. Joseph Railroad Company of Missouri in the same position. Section 4, act of 1864 (13 Stats. at Large, 356), amends section 3 of the act of 1862 by doubling the land grant contained in the latter act. Section 17 relieves the Union Pacific from the obligation to build the Sioux City branch, and authorizes its construction by a company to be designated by the President of the United States, "on the same terms and conditions as are provided in this act and the act to which this act is an amendment, for the construction of the Union Pacific railroad and telegraph line and branches," except that it shall receive no more bonds than the Union Pacific would have received if it had built the Sioux City branch under the former legislation, but that it should receive alternate sections of land for ten

miles in width on each side of the same *along the whole length of said branch*.

The pleadings and stipulation of facts show that the Union Pacific Company filed their assent to the act of July, 1862, as required by the 7th section of the act. No other assent or acceptance of that act or the act of July 2d. 1864, was required. The location for one hundred miles westward from the Missouri river was made by actually surveying and staking the line as built upon in the month of November. 1863, and a map of the location at the time was filed in the Interior Department October 24th, 1864, and one hundred miles built in 1865.

This map referred to the acts of 1862 and 1864, and contained the statement therein, indorsed by the officers of the Union Pacific Railroad Company, that the "red line on said map is hereby (October 19, 1864), designated as the permanent location of the route of the road for one hundred miles west of its eastern terminus." A partial change of the line was made by the company and approved by the department in 1865.

The Sioux City and Pacific Railroad Company commenced its corporate existence August 1st. 1864. It was designated by the President to build the Sioux City branch December 24th, 1864, and it designated the general route of the road July 24th, 1865, and built it in 1869.

The lands in controversy lie within one hundred miles of the eastern terminus of the Union Pacific railroad.

E. S. Bailey and *N. M. Hubbard* for the Sioux City Railroad Company.

A. J. Poppleton for the Union Pacific Railroad Company.

DILLON, Circuit Judge:

One of these suits relates to lands *within* the *ten*-mile limit of the land grant of the Union Pacific Railroad Company, and the other to lands *outside* of the ten-mile and within the twenty-mile limit. The lands are patented to the contesting companies, jointly, as tenants in common. Each company claims for itself the sole and absolute ownership of all the lands. If any portion of the lands are decided to belong to the complainant, it asks a decree to that effect and that partition be made.

1. It is insisted by the Sioux City Company that the Union Pacific Railroad Company has no title *outside* of the *ten*-mile limit of its land grant.

The ground of this claim is that, inasmuch as said lands lie east of the one-hundredth meridian, and along the Iowa branch, the land grant was not, as to said branch, enlarged by the act of 1864, which extented the lateral limits of the grant from ten miles to twenty miles.

I am of opinion that the act of 1864, as to bonds and lands, applied as well to the *branches* (including the Iowa branch) as to the main line, or stem of the road.

No reason appears for excluding the branches. All were parts of the common scheme or system of roads to connect the Pacific coast with the States at different points on the Missouri river. Such has been the uniform construction of the executive department of the government, and lands have been patented to the Central Pacific, the Kansas Pacific, and other branches of the Pacific system of roads, according to this construction. This construction is right, as the acts of 1862 and 1864, as to the extent of the grant, are to be read and taken together. This court has always acted upon this view, and such would seem to be also the opinion of the Supreme Court. (*Prescott* v. *Railroad Company*, 16 Wall., 607.)

Besides, the 17th section of the act of 1864, in referring to the "terms and conditions" upon which the Sioux City road is to be built, speaks of them as those "provided in this act (1864), and the act to which this is an amendment, for the construction of the Union Pacific railroad and telegraph line and *branches*." If the act of 1864 made no change as to *branches* in respect to the "terms and conditions" of the grant, why were branches mentioned in that act in this regard?

2. The next ground of exclusive ownership in the Sioux City Company, against the Union Pacific Company, is based upon the words of the proviso in the 17th section of the act of 1864 (this being the section relating to the Sioux City Company), that "said company shall be entitled to receive alternate sections of land, for ten miles in width, along the *whole length of said branch*."

In this connection we may refer also to the claim of the Union Pacific railroad to the exclusive ownership of the same lands. This claim is based upon two main grounds. The first is, that the grant to the Sioux City Company is provisional and contingent, depending upon the designation by the President of a grantee, etc., whereas its grant is present and certain. Second, it claims that as its line was definitely located before the line of the

Sioux City Company, and as its road was actually constructed first, it thereby became entitled to the lands within the limits of the common territory. These conflicting claims depend for their solution upon the construction of section 17 of the act of 1864, amending section 14 of the act of 1862. The act of 1862 required the Sioux City branch to be built by the Union Pacific Company whenever Sioux City should have a completed line of railway to the east. It was to be constructed on the "same terms and conditions" as the Union Pacific Company was to construct its other lines. It was to connect with the Iowa branch, or with the main line not farther west than the one-hundredth meridian. The point of junction was to be fixed by the President.

The act of 1864 released the Union Pacific Company from the obligation to construct the Sioux City branch. It empowered the President to designate the State corporation to construct the branch.

The line of road was to be the same as before, with the important exception that the *company*, instead of the President, was allowed to "select" the point of junction with the Union Pacific road, and might fix it hundreds of miles *west* of the one hundredth meridian, if it chose. This important power, if not limited, might be exercised so as to involve the government in a subsidy greatly in excess of that needed to perfect and secure its scheme of roads. To guard against abuse in this respect, the Congress had the wisdom to enact, in the form of a *proviso* to restrain the grant, the following: "And the said company constructing said branch, shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under *this act, and the act to which this is an amendment*; but said company shall be entitled to receive alternate sections of land, for ten miles in width, on each side of the same, along the whole length of said branch." Now, it is plain that, while the Sioux City branch was constructed under the 17th section of the act of 1864, yet that section is an *amendment* of the 14th section of the act of 1862, in this respect, and is to be construed accordingly; and the Sioux City Company has the same rights as if this branch had been constructed by the Union Pacific Company under the same legislative provisions.

The inception of the grants to both these contesting companies is the same.

They are contemporaneous in their origin. They both spring from the same legislation. The right of the one company, as respects the other, does not depend upon priority of location or construction.

The special provisions of the proviso limit the subsidy to the Sioux City Company. It might build its road west of the one hundredth meridian, but it could not get bonds for any greater distance, but it was entitled to receive land for the distance actually built, within lateral limits of ten, instead of twenty miles, on each side of the road. So, by the contemporaneous legislation, the Union Pacific Company was, within the designated lateral limits, entitled to receive land for all the line of road it constructed. It is evident that, as these roads must unite, these limits will conflict, and lands granted will lie in the common territory. This controversy relates to such lands.

As the grants are the same in their origin and purpose, and both companies have complied with the conditions, the case is peculiarly one in which *equality is equity*. Such was the view of the land department, and it is the judgment of this court, that neither company is entitled to the exclusive ownership as against the other.

The Sioux City Company bases its claim to exclusive ownership on the words of the proviso—"along the whole length of said branch." The purpose for which these words were used was not to give priority over the main company where the grants might conflict. The whole proviso, taken together, in connection with the other portion of the section, shows that when Congress allowed the company to fix its own point of junction it in effect said: "Yes, you may do this, but only on condition that, if you go west of the one-hundredth meridian, you shall not get any extra bonds; but you may have lands as far as you go, but must take them within lateral limits of ten instead of twenty miles."

A decree will be entered that the parties are tenants in common as respects the lands jointly patented, and for a partition if the companies cannot agree upon a division.

Decree accordingly.

NOTE.—This decree was acquiesced in by the parties, who subsequently effected an amicable partition of the lands. Construction of land grant to the Burlington and Missouri River Railroad Company in Nebraska, 13 Stats. at Large, 356, sec. 10. See *United States* v *Burlington and Missouri River Railroad Company ante*.

Also see *The Missouri, Kansas and Texas R. R. Co.* v. *The Kansas Pacific R. R. Co.*, decided by the U. S. Supreme Court at the October term, 1878.

RAILROAD COMPANY *v.* FREMONT COUNTY.

December Term, 1869.—9 Wallace, 89.

The proviso in the act of May 15th, 1856, to the State of Iowa for aid in the construction of railroads, which excludes from the grant "all lands heretofore reserved by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatever," excludes the lands granted to that State, among others, by the act of September 28th, 1850, known as "the swamp-land grant."

IN ERROR to the Supreme Court of Iowa.

Fremont county, Iowa, filed a bill in one of the State courts of Iowa against the Burlington and Missouri River Railroad Company to quiet the title to twelve thousand seven hundred and fifty-four acres of land, or thereabouts, situate in the said county, which the company claimed as belonging to it. Both parties set up title under grants by acts of Congress—Fremont county under what is known as "the swamp-land grant" to the State of Iowa, September 28th, 1850 (9 Stat. at Large, 519); the railroad company under a grant to the State for aid in the construction of railroads, May 15th, 1856 (11 Stat. at Large, 9).

The title of Fremont county, the complainant, was as follows:

By the 1st section of the act of September, 1850, it is provided: "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State."

Section 2d provides: "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State; and, at the request of said governor, cause a patent to be issued to the State therefor, and on that patent the fee-simple to said land shall vest in the said State, subject to the disposal of the legislature thereof; provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Section 3d: That in making out a list and plats of the land aforesaid all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom.

"Section 4th: That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands known and designated as aforesaid may be situated."

Under this last section the State of Iowa became entitled to the benefit of this act. After its passage the only important steps to be taken to perfect the title in the State were the ascertainment and designation of the several subdivisions which fell within the description of swamp lands as defined in the third section. This duty was cast upon the Secretary of the Interior as the head of the land department.

On the 21st of November, after the passage of the act, the Commissioner of the Land Office issued instructions to the surveyor general of the State to make a selection of these subdivisions, and report the same to the department, (see also letters December 21st, 1853; January 22d, 1859. Lester's Land Laws, pp. 543, 551, 559), and also to transmit copies to the local land offices. This duty was performed in accordance with the instructions. The first list was returned and filed in the General Land Office September 20th, 1854, and in the local office October 23d, 1854. The second and remaining list was returned and filed in the General Land Office January 21st, 1857, and in the local office January 23d, 1857. These two lists contain the whole of the lands in controversy. On the filing of the lists in the local office the register was directed to make a note of the subdivisions in his tract-book, and to withdraw them from the market, which was done accordingly.

In this connection it may be proper to refer to the act of March 2d, 1855 (10 Stat. at Large, 634), which is, "An act for the relief of purchasers and locators of swamp and overflowed lands." It provides, in substance, that patents shall be issued to purchasers or locators who had made entries of the public lands claimed as swamp lands prior to the issue of patents to the States under the second section of the swamp-land grant of 1850, and providing for an indemnity to the States. Conflicts had arisen between these purchasers and locators on the one side and the States

claiming the land under the swamp-land grants. As these lands were not withdrawn from sale till the filing of the lists in the local land office, they were supposed to be open to entry or location, and a portion of them had been thus appropriated. On the other hand, the States claimed that the grant to them by the act of Congress was a grant *in presenti*, and vested the title immediately. Such had been the opinion expressed by the land commissioner, and also by the Attorney General.

The embarrassments of the land department growing out of this controversy between the States and the settlers were removed by this act of 1855, which confirmed the title of the settlers and compensated the States for the land of which they were deprived.

The second section of the act provided that compensation should be allowed to the States only in respect to subdivisions taken up by the settlers which were swamp lands within the true intent and meaning of the act of 1850—that is, where the greater part were "wet and unfit for cultivation." And the land department, therefore, allowed parties to contest the claim of the States, and to give evidence before the proper officers that the subdivision was not of the character contemplated by the law. As a consequence, under this construction of the act, controversies increased between the settlers and the States, and, as stated by one of the commissioners of the land office, the contesting applications pending before the department involved, by estimate, three millions of acres; and, on investigations being ordered, papers came into the office by bushels. Pending these proceedings Congress intervened and passed the act of March 3d, 1857. (11 Stat. at Large, 251.) This act is entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of March 2d, 1849."

The act contains but one section, and it provides "that the selection of swamp and overflowed lands granted to the several States, by the act of Congress approved September 28th, 1850, and the act of 2d March, 1849, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing laws of the United States, be, and the same are hereby confirmed, and shall be approved and patented to the several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable," with a proviso saving the act of March 2d, 1855, which

is continued in force, and extended to all entries and locations claimed as swamp lands, made since its passage. As we have already stated, the selection of the swamp and overflowed lands by the State of Iowa, under instructions from the land department, involved in this suit, were made, and lists returned and filed in the department September 20th, 1854, and January 21st, 1857, which was before the passage of this act. And these are the selections referred to, confirmed and approved, and for which patents were directed to be issued as soon as practicable, if the same were vacant and unappropriated, or not occupied by an actual settler, under some law of Congress.

So far as respects the title of the complainant, Fremont county.

The title of the railroad company, which, as already stated, was under the act of May 15th, 1856, was thus. That act provides "that there be and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river, near the mouth of the Platte river" (naming, also, several other lines of railroads) "every alternate section of land designated by odd numbers, for six sections in width, on each side of each of said roads," and then provides that, when the lines of the road shall be "definitely fixed," if it shall appear that any of the lands within these six sections shall have been "sold, or otherwise appropriated," alternate sections may be selected, of equal quantity, within fifteen miles of the road.

To this grant is the following proviso:

"That any and all lands heretofore reserved to the United States, by any act of Congress, or in any manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The location of the railroad was not made on the ground, and adopted by the company, until March 24th, 1857.

The district court rendered a decree declaring the right and title to be in the county, and the claim of the railroad company to be void. The railroad company appealed to the Supreme Court of the State, which, after hearing, affirmed the decree of

the district court. The railroad company now brought the case into this court for re-examination.

The case was submitted on the record, with briefs of *Messrs. Rohrer and Strong* for the plaintiff in error, and of *Mr. Harvey contra.*

MR. JUSTICE NELSON, having stated the case in the way already given, delivered the opinion of the court.

It will be seen, from an examination of the grant made to the railroad company, by the act of May 15th, 1856, that the reservations annexed to it are very full and explicit. They are first found in the enacting clause itself, where provision is made for the selection of lands beyond the lines of the six sections on each side or the road, in case any of the sections had been previously "sold or otherwise disposed of;" and then again, in the general proviso to the grant. These reservations clearly embrace the previous grant of the swamp and overflowed lands, for the purpose of enabling the States to redeem them, and fit them for cultivation, by levees and drains. At the time of the passage of this act (May 15th, 1856), a moiety of the lands in controversy had been selected and reported to the land department; and the authorities of the State, under instructions from that department, were engaged in the selection of the remainder. The lands already selected and returned, had been withdrawn from sale, and were not in the market at the time of the passage of the act; and as soon as the remaining lists were returned, which was January 21st, 1857, they were also withdrawn from the market. In the language of the railroad act, the whole of the lands in controversy were "otherwise appropriated," and were "reserved" for the purpose of aiding the States in their objects of internal improvements.

But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of lands falling within the grant; nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float, until this line was permanently fixed. Now, the proofs show that the location of the road was not made on the ground and adopted by the company till the 24th March, 1857, which was after the confirmatory act of that year.

This, as we have seen, confirmed all the selections made at the time, and which included all in controversy in this suit, in the language of the section, "so far as the same shall remain vacant, and unappropriated, and not interfered with by actual settlement." As the railroad company at this time, for the reasons above stated, had not perfected their grant so as to have become invested with the title to any of the sections included in the lists or selections of the swamp lands on file in the land department, they can set up no appropriation of any of these lands under their grant, which leaves them subject to the confirming act of 1857, according to the very words of it. *Decree affirmed.*

NOTE.— About a fortnight after the above reported case was adjudged, there was adjudged another from a different State, and which, as respected the position of parties, was a sort of converse to it; and in its nature somewhat supplementary. It is accordingly reported in immediate sequence. From its correlative character, as just described, the reader will readily understand that he must be possessed of the preceding case in order to understand this one. It was the case of—

RAILROAD COMPANY *v.* SMITH.

9 Wallace, 95.

1. The act of June 10th, 1852, concerning swamp and overflowed lands, confirmed a present vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior.
2. These lands were excepted from the subsequent railroad grants to Iowa and Missouri.
3. In a suit to recover lands which the plaintiff claims under one of the railroad grants, it is competent to prove by witnesses who know the lands sued for, that they were swamp and overflowed within the meaning of the swamp-land grant, and therefore excluded from the railroad grant.

ERROR to the Supreme Court of the State of Missouri.

The Hannibal and St. Joseph Railroad Company brought ejectment against Smith, in one of the county courts of Missouri, to recover possession of certain lands.

The title of the railroad company was deduced from an act of Congress, entitled, "an act granting the right of way to the State of Missouri, and a portion of the public lands, to aid in the construction of certain railroads in said State," approved June 10th, 1852. This act granted to the State of Missouri, for the purpose

of making the railroad, every alternate section of land designated by even numbers on each side of the road.

The legislature of Missouri, in September, 1852, accepted the grant, and by statute vested the land granted in the railroad company.

Such was the title of the plaintiff.

That of the defendant, Smith, was deduced from the same "swamp-land grant," the act of Congress, namely, which is set out in the statement of the last reported case, approved September 28th, 1850, by which Fremont County in that case held its lands. But in this case the railroad interest was the actor; not as in the last one a defending party merely with a swamp-land grantee in the position of assailant.

On the trial below of the present cause the defendant introduced evidence against objection tending to prove that the lands in suit were wet and unfit for cultivation at the date of the swamp-land act of 1850; and this was his title. No evidence was introduced by him tending to show that the land in suit was ever certified as swamp land by the Secretary of the Interior, or that the same was ever patented as such to the State of Missouri. Nor was this pretended. In fact the correspondence of the land department of the United States, showed that the secretary had no sufficient evidence to enable him to make such certificates.

The court in which the suit was brought gave judgment for Smith, the defendant, and the railroad company appealed to the Supreme Court of Missouri. That court affirmed the judgment of the court below, and the railroad company now brought the case here.

Messrs. James Carr and *W. P. Hall* for the plaintiff in error.

Mr. Drake contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The grants of lands by Congress to the States in aid of railroads have generally been made with reference to the lands through which the roads were to pass, and, as the line of the road had to be located after the grant was made, it has been usual in the acts making the grant, to describe them as alternate sections of odd numbers within a certain limit on each side of the road, when it should be located.

This, of course, left it to be determined by the location of the road what precise lands were granted. So far as this uncertainty

in the grant was concerned, it was one that might remain for a considerable time, but which was capable of being made certain, and was made certain by the location of the road. But as Congress could not know on what lands these grants might ultimately fall, and, as the roads passed through regions where some of the lands had been sold, some had been granted for other purposes, and some had been reserved for special uses, though the title remained in the United States, these statutes all contained large exceptions from the grant, as measured by the limits on each side of the road, and as determined by the odd numbers of the sections granted.

We have had before us two cases growing out of the construction to be given to the language of these exceptions in the grant of May 15th, 1856, to the State of Iowa. The first of these was the case of *Walcott* v. *The Des Moines Company* (5 Wallace, 681). The other is the case of *The Railroad Company* v. *Fremont County*, decided at this term. (The case immediately preceding.)

The case before us arises under a similar grant to the State of Missouri, with like reservations in the act, but it raises a question somewhat different from that presented by the other two cases.

In the last of those cases it was determined that a proviso which excluded from the grant "all lands heretofore reserved by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," excluded the lands granted to the States by the act of September 28th, 1850, known as the swamp-land grant. In that case the county of Fremont, claiming under the swamp-land grant, was plaintiff, and the railroad company, claiming under the grant to the State for railroads, was defendant, and the main point in it related to the evidence which might be necessary to establish the fact that the lands claimed by plaintiff were swamp and overflowed within the meaning of the act of 1850.

In the present case the position of the parties is reversed, the plaintiff claiming under the act of June 10th, 1852, granting lands to the State of Missouri for railroad purposes, and the defendant claiming under the swamp-land grant.

In the former case it was necessary for the plaintiff, who must succeed on the strength of her own title, to show satisfactory evidence that the title of the United States had, under the swamp-

land grant, become vested in Fremont county. The opinion of the court shows how this was successfully done in that case.

In the present action it was incumbent on the railroad company to show that the title of the United States had become vested in the company under the grant for railroad purposes.

It has admitted that this has been done, unless the land is of that class reserved from the grant as swamp land; for the act under which plaintiff claims has an exception in precisely the same terms with the act for the benefit of the Iowa railroads.

In the former case the plaintiff, claiming under the swamp-land grant, was bound to establish his title by such evidence as Congress may have determined to be necessary to make the title complete in the State, or the grantee of the State, to which the lands were supposed to be granted, otherwise the plaintiff established no legal title. In the present case it is not necessary to defeat the title under the railroad grant to show that all the steps prescribed by Congress to vest a complete title in defendant under the swamp-land grant, have been taken. It is sufficient to show that this land which is now claimed under the railroad grant, was reserved out of that grant, and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land, as described in the act of 1850.

In order to determine the character of the testimony which will prove this, it may be useful to look at the statute which granted these swamp lands.

The first section of the act, after declaring the inducements to its passage, says that the whole of these swamp and overflowed lands, made thereby unfit for cultivation, and unsold, are hereby granted to the States.

The third section, for further description, says that all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included as swamp lands; but when the greater part is not of that character the whole of it shall be excluded.

Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted, to wit, such legal subdivisions of the public lands, the greater part of which were so far swamp and overflowed as to be too wet for cultivation.

Now, here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges, and sections to identify them as coming within it. In

this respect it is precisely like the railroad grants, which only became certain by the location of the road.

In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future.

No act of Congress has ever attempted to take back this grant of the swamp lands, or to forfeit it, or to give it to any other grantee, or modified the description by which they were given to the States. It was protected by positive reservation in the grant under which plaintiff claims.

Now, when a party claiming under that grant sues to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class covered by the first grant, and excepted from the second, namely, so swampy, overflowed, and wet as that the major part of the tract was unfit for cultivation?

By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer had neglected to do this?

The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity?

The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was

primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant.

The decision of the case of the *Railroad Company* v. *Fremont County*, disposes of all the errors alleged in this case but the admission of the verbal testimony, and as we are of opinion that the State court did not err in that, the judgment is

Affirmed.

MR. JUSTICE CLIFFORD dissenting.

Unable to concur in the judgment of the court in this case, I think it proper to state the reasons of my dissent.

Congress made provision, by the first section of the act of the twenty-eighth of September, 1850, that swamp and overflowed lands, "made unfit thereby for cultivation," and which remained unsold at the passage of the act, should be granted to the States in which the same were situated, to enable the States to construct the necessary levees and drains to reclaim the lands so granted, and render them fit for cultivation. (9 Stat. at Large, 519.)

Such lands were a part of the public domain, and of course it was necessary, before the title could vest in the States, that the land should be surveyed and designated, as lands not made unfit thereby for cultivation were no more included in the first section of the act than lands sold prior to its passage.

Taken literally, the first section, it is conceded, purports to grant the whole of these swamp and overflowed lands, made unfit thereby for cultivation; but the second section makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the lands described as aforesaid; and the third section provides that, in making out said list and plats, whenever the greater part of a subdivision is wet and unfit for cultivation, the whole of it shall be included in the list and plats, which is a matter to be ascertained and determined by the Secretary of the Interior, and which, under the act of Congress, cannot be ascertained and determined by any other tribunal. Lands fit for culti-

vation, under those circumstances, are to be included in the list and plats; but the corresponding provision in the same section is, that if the greater part of a subdivison is not of that character, that is, not swamp and overflowed lands, made unfit thereby for cultivation, then the whole of the subdivision shall be excluded from the list and plats.

Special power is conferred upon the Secretary of the Interior to make out an accurate list and plats of the lands, and it is quite clear that a jury is no more competent to ascertain and determine whether a particular subdivision should be included or excluded from the list and plats required to be made under that section, than they would be to make the list and plats during the trial of a case involving the question of title.

Courts and juries are not empowered to make the required list and plats, nor can they determine what particular lands shall be included in the list and plats before they are prepared by the officer designated by law to perform that duty.

Support to that conclusion is derived from the subsequent language of the same section, which makes it the duty of the secretary, when the lists and plats are prepared, to transmit the same to the governor of the State, and to cause a patent to be issued to the State for the lands. Unless the requirements were such as is supposed, it is difficult to see how the affairs of the land department can be administered, as the records and files of the office would not furnish any means of determining whether a given parcel of land belongs to the State in which it is situated, or to the United States.

Evidently, the title to the lands remains in the United States until these proceedings are completed, as the same section which makes it the duty of the secretary, when the list and plats are prepared, to transmit them to the governor, and to cause a patent to be issued therefor, also provides that, when the patent is issued, "the fee simple to said lands shall vest in the said State, * * * * subject to the disposal of the legislature thereof."

Prior to the issuing of the patent therefor, the fee simple to the lands does not vest in the State, and the lands, prior to the date of the patent, are not subject to the disposal of the legislature.

Strong confirmation that the construction of that act herein adopted is correct, is also derived from the subsequent legislation of Congress upon the same subject. Selections of swamp and

overflowed lands were made by the States, in certain cases, under that act, before the required list and plats were made by the secretary, and Congress, on the third of March, 1857, passed an amendatory act to remedy the difficulty, in which it is provided to the effect that such selections, if reported to the General Land Office, should be confirmed, provided the lands selected were vacant and unappropriated, and the selections did not interfere with actual settlements, under any existing laws of the United States. (11 Stat. at Large, 251.)

Such a law was certainly unnecessary, if the construction of the original act, adopted in the opinion just read, is correct, as, in that view, the original act vested a fee simple title in the States, without the necessity of waiting for any action on the part of the land department; and, if so, then it follows that the States may select for themselves, and if their title is questioned by the United States, or by individuals, they may claim of right that the matter shall be determined by jury.

Anticipating that the decision will occasion embarrassment to the land department, I have deemed it proper to state, thus briefly, the reasons of my dissent.

NOTE.—In case the lands claimed by the railroad company as being within their grant, had been taxed by the county as railroad land, for seven years, and the taxes paid by the company, the county is estopped from asserting title to the land under the swamp land grant. (*Adams* v. *B. and M. R. R. Co.*, 39 Iowa, 507.) But to make out the case of estoppel, it is essential that the taxes have been paid by the railroad company, assessment alone is not sufficient. (*Page County* v. *B. and M. R. R. Co.*, 40 Iowa, 520); also see *Buena Vista County* v. *I. F. and S. C. R. R. Co.*, 46 Iowa, 226.)

FRENCH *v.* FYAN ET AL.

October Term, 1876.—3 Otto, 169.

1. The act of September 28, 1850 (9 Stat., 519), granting swamp lands, makes it the duty of the Secretary of the Interior to identify them, make lists thereof, and cause patents to be issued therefor. *Held*, that a patent so issued cannot be impeached in an action at law by showing that the land which it conveys was not in fact swamp and overflowed land.
2. *Railroad Company* v. *Smith*, 9 Wall., 95, examined, and held not to conflict with this principle.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Argued by *Mr. D. T. Jewett* for the plaintiff in error, and by *Mr. Montgomery Blair* for the defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This action of ejectment was tried by the court below without a jury, by agreement of the parties, and the only finding made by the court was a general one in favor of defendant, on which judgment was rendered in bar of the action.

The single question in this case is raised on the refusal of the court to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question, under the act of 1850, known as the "swamp-land grant," the purpose being to show by such testimony that it was not in point of fact swamp land within the meaning of that act.

The bill of exceptions shows that the land was certified in March, 1854, to the Missouri Pacific Railroad Company, as part of the land granted to aid in the construction of said road by the act of June 10, 1852, and the plaintiff, by purchase made in 1872, became vested with such title as this certificate gave.

To overcome this *prima facie* case defendant gave in evidence the patent issued to Missouri in 1857, under the swamp land act, and it was admitted that defendant had a regular chain of title under this patent.

It was at this stage of the proceeding that the plaintiff offered to prove, in rebuttal, by witnesses who had known the character of the land in dispute since 1849 till the time of trial, that the land in dispute was not swamp and overflowed land, made unfit thereby for cultivation, and that the greater part thereof is not, and never has been since 1849, wet and unfit for cultivation.

But the court ruled that, since the defendant had introduced a patent from the United States to the State for the said land under the act of September 28, 1850, as swamp land, this concluded the question; and the court, therefore, rejected said parol testimony, to which ruling of the court the plaintiff then and there excepted.

This court has decided more than once that the swamp land act was a grant *in presenti*, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore which is the evidence that the lands contained in it had been identified as

swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the act of 1850; for while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company.

The only question that remains to be considered is, whether, in an action at law in which these evidences of title come in conflict, parol testimony can be received to show that the land in controversy was never swamp land, and therefore the patent issued to the State under that act is void.

The second section of the swamp land act declares: "That it shall be the duty of the Secretary of the Interior, as soon as practicable after the passage of this act, to make out an accurate list and plats of the land described as aforesaid, and transmit the same to the governor of the State, and, at the request of the governor, cause a patent to be issued to the State therefor, and on that patent the fee-simple to said lands shall vest in said State, subject to the disposal of the legislature thereof." It was under the power conferred by this section that the patent was issued under which defendant holds the land. We are of opinion that this section devolved upon the secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.

We have so often commented in this court on the conclusive nature and effect of such a decision when made and evidenced by the issuance of a patent, that we can do no better than to repeat what was said in the case of *Johnson* v. *Towsley*, 13 Wall., 72, where the whole question was reviewed both on principle and authority. In that case it had been strongly argued that the specific language of one of the statutes concerning pre-emption on the public lands made the decision of the Commissioner of the General Land Office conclusive everywhere and under all circum-

stances. The court responded to this argument in this language:

"But while we find no support to the proposition of the counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine, that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected or declared void, or other relief granted."

We see nothing in the case before us to take it out of the operation of that rule; and we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well considered judgments in this court, and in others of high authority, to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court setting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

The learned judge of this court, who presides in the California circuit, has called our attention to a series of decisions of the supreme court of that State in regard to this swamp-land grant, commencing with 27 California Reports, 87, in which a different doctrine is announced. But with all the respect we have for that

learned court, we are unable to concur in the views therein expressed. The principle we have laid down is in harmony with the system which governs the relations of the courts to the officers of the executive departments, especially those having charge of the public lands, as we have repeatedly decided, and we must abide by them.

We do not mean to affirm that there is anything in the case before us, as it is here presented, which would justify a resort to a court of chancery; we merely mean to express our conviction, that the only mode by which the conclusive effect of the patent in this case can be avoided, if it can be done at all, is by a resort to the equitable jurisdiction of the courts.

The case of *Railroad Company* v. *Smith*, 9 Wall., 95, is relied on as justifying the offer of parol testimony in the one before us. In that case it was held that parol evidence was competent to prove that a particular piece of land was swamp land, within the meaning of the act of Congress.

But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said: "The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before the court whose duty it became, because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose." There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the secretary to perform his duty. (*Gaines* v. *Thompson*, 7 Wall., 347; *Secretary* v. *McGarrahan*, 9 *Id.*, 298; *Litchfield* v. *The Register and Receiver*, *Id.*, 575.)

There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, this secretary had made any decision, the evidence would have been excluded. *Judgment affirmed.*

NOTE.—The reservation in the act of March 2, 1849, reserving land "claimed or held by individuals," only applied to lands claimed or held under a title or right recognized by law. Mere possession of land was not sufficient. *Lawrence* v. *Grout*, 12 La. Ann., 835.

The act gave the State a present vested right to all lands of the character designated in the act, and a sale thereafter by the United States, of such lands, could not defeat the grant. *Clarkson* v. *Buchanan*, 53 Mo., 563; *Campbell* v. *Wortman*, 58 Mo., 258; *Daniel* v. *Perris*, 50 Miss., 261; *Supervisors Whitesides Co.* v. *State Attorney*, 31 Ill., 68; *Gaston* v. *Stoll*, 5 Oregon, 48.

A certified copy of the approved list of selections is sufficient evidence of title in an action of ejectment. *Dart* v. *Hercules*, 34 Ill., 394.

In an action of ejectment, if the holder of title by patent from the State, prove that the land at the date of the swamp-land act, was subject to overflow, and required artificial means to subject it to beneficial use, he can recover against one holding under a patent from the United States, issued previous to his, but subsequent to the swamp-land act. Such patent issued by the United States is void. *Keeler* v. *Brickey*, 78 Ill., 133.

The question whether a given subdivision of land is within the act, is a question of fact, to be determined, not upon official certificates, but upon evidence that would be competent to prove the fact, if it arose in issue upon a conveyance between private persons. *Keeran* v. *Griffith*, 27 Cal., 87, and 31 Cal., 461.

The map approved by the surveyor general should not be admitted to prove the general character of the land. *Robinson* v. *Forrest*, 29 Cal., 317. The test is, can the land be "successfully cultivated in any of the staple crops." *Keeran* v. *Allen*, 33 Cal., 542; *Wright* v. *Carpenter*, 47 Cal., 436, and 49 Cal., 607; *Thompson* v. *Thornton*, 50 Cal., 142.

The second section of the act of March 12, 1860, requiring the selection to be made within two years, was directory only, and need not be strictly complied with. *Gaston* v. *Stoll*, 5 Oregon, 48.

C. C. MARTIN AND NANCY MARTIN, personally and as tutrix of her minor children, plaintiffs in error, *v.* JAMES MARKS.

No. 220.—October Term, 1877.

1. The act of March 3, 1857 (11 U. S. Stat., 251), perfected the title of the States to the selections of swamp lands which had then been certified to and filed with the Commissioner of the General Land Office, so far as they were then vacant, unappropriated, and not interfered with by actual settlement under existing laws.
2. The land department could not set aside these selections, because they were confirmed by this act, and the United States could convey no title after this to any of these lands, unless they came within the exceptions in the act of 1857.

IN ERROR to the Supreme Court of the State of Louisiana.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of Louisiana, in which court a judgment in an action in the nature of ejectment was rendered affirming the judgment of the court in the parish of Caddo in favor of Marks.

Marks, who was plaintiff below, asserted title under the swamp land act of September 28, 1850, and the earlier act of March 2, 1849, in regard to the same class of lands in the State of Louisiana. The defendants relied on a patent from the United States, dated May 20, 1873. The evidence of plaintiff's title under the act of 1850, which is all we shall now consider, is as follows:

"NORTHWESTERN DISTRICT LA.

A.—List of swamp land unfit for cultivation, selected as enuring to the State of Louisiana, under the provisions of an act of Congress approved 28th September, 1850, excepting such as are rightfully claimed or owned by individuals.

To. 20 N., R. 14 W., west side of Red river.

Parts of section.	Section.	Area.	Estimated area.	Remarks.
All of	7		640.00	

SURVEYOR GENERAL'S OFFICE.

Donaldsonville, La., May 18th, 1852.

Examined and approved.

(Sig.) R. W. BOYD,

Surveyor General, La."

To this was attached a certificate of S. S. Burdette, Commissioner of the General Land Office, dated Department of the Interior, General Land Office, April 30, 1875, that the foregoing was truly copied from a list of the swamp lands returned to that office by the surveyor general of Louisiana. This was followed by sufficient evidence of title under the State of Louisiana. Neither this certificate nor anything in the record shows precisely when this list was filed in the General Land Office at Washington.

We have within the last few days, in the case of *The American Emigrant Company* v. *Wright County*, had occasion to comment on the failure of the Secretary of the Interior to make out and certify to the States the lists of swamp lands to which they were severally entitled, and the expedients to which the States were compelled to resort to obtain the evidence of their title to those lands. We have also held in previous cases that when this was ascertained and the lands identified by proper authority, that the title related to the date of the grant, namely, September 28, 1850, and superseded any subsequent grant or evidence of title issuing from the United States. (*Railroad* v. *Smith*, 9 Wall., 95; *French* v. *Fyan*, 93 U. S. R., 169.)

The above certificate of what took place in the office of the surveyor general shows what was the course adopted in the State of Louisiana to secure identification and lists of these lands in that State, and a similar course was pursued in other States. But these selections, though approved by the surveyor general, who was merely a local officer, still lacked the authentication of the Secretary of the Interior, to whom alone Congress had confided the duty of confirming or making for himself these selections.

It will be observed that the selection in the present case was approved by the surveyor general in May, 1852. It seems that in the year 1857, seven years after the passage of the swamp land grant, this failure of the secretary to act had become a grievance, for which Congress felt it necessary to provide a remedy. This it did by the act of March 3, 1857. (11 U. S. Statutes, 251.)

That act declared that the selection of swamp and overflowed lands granted to the States by the act of 1850, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated and not interfered with by any actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the States in conformity to the provisions of said act.

If the paper signed by the surveyor general of Louisiana, dated May 18, 1852, was on file in the General Land Office at Washington on the day that this act was approved, namely, March 3, 1857, we have no doubt that the act completed and made perfect the title of the State of Louisiana to the land now in controversy. If this were so, the title of plaintiff below was superior to the patent issued to defendant in 1872, for the land department had no right

after that act to set aside the selection. The approval and patenting of those selections were mere ministerial acts in regard to which they had no discretion, unless it was found that they were not vacant, or had been actually settled on adversely to the swamp-land claim. The act of 1850 was a present grant, subject to identification of the specific parcels of land coming within the description of it, and the selections confirmed by the act of 1857 furnished this identification and made the title perfect.

But, as we have said, there is in the record no conclusive evidence that *this* selection was on file in the General Land Office at the passage of the act. It had been filed with and approved by the surveyor general in Louisiana in 1852. It was found in the General Land Office at Washington when a copy was applied for in 1875. If objection had been taken to this defect of proof on the trial it would probably have been required of plaintiff to show when this list was filed in the latter office. But sitting here as an appellate court, two removes from that which tried the case originally, we hold: (1) That after verdict, or the judgment of the court sitting as jury, where no such objection was made at the trial, we must hold that the court or jury had a right to presume that the surveyor general did his duty and forwarded this list from his office to that of the General Land Office some time between May, 1852, and March 3, 1857: and (2) that this question of evidence is not of that federal character which authorizes us to review the decision of the Supreme Court of Louisiana upon it.

The judgment of that court is therefore *Affirmed.*

NOTE.—Sales of swamp land by the United States after the date of the act of September 28, 1850, were illegal and void, and the act of March 3, 1855, confirming such entries, could not give them validity as against a purchaser from the State. *Bush* v. *Donohue*, 31 Mich., 48?.

The act of the legislature of January 11, 1852, must be construed to be a consent on the part of the State to receive from the United States the purchase-money paid to the latter for all such of the swamp lands as the State could rightfully relinquish.

The act was not a confirmation of sales made by the United States of lands to which persons had obtained a right as against the State, under a State law, before the purchase of the same by another from the United States. *Fletcher* v. *Pool*, 7 Barber (Ark.), 100; *Branch* v. *Mitchell*, 24 Ark., 431.

ADAM HAM, plaintiff in error, *v.* THE STATE OF MISSOURI.

December Term, 1855.—18 Howard, 126; 1 Miller, 110.

School Lands—Sixteenth Section.

1. It was the intention of the 6th section of the act of March, 1820, under which the State of Missouri was organized, to grant to the State, for school purposes, every sixteenth section of land not otherwise disposed of, to which the United States had a good title.
2. The tenth section of the act of March 3, 1811, and its proviso, did not hinder the United States from making this grant.
3. The confirmation by Congress, in the act of 1828, of the claim of the proprietors of Mine la Motte, which had been rejected several years before the act of 1820, did not, nor was it intended to, defeat the title to the sixteenth section, which passed by the act of 1820. It only purported to relinquish such title as the Unithd States had at its passage in 1828.

THIS was a writ of error to the Supreme Court of the State of Missouri, and the case is fully stated in the opinion of the court.

Mr. Geyer for plaintiff in error.

No counsel for the State.

MR. JUSTICE DANIEL delivered the opinion of the court.

Upon a writ of error to the supreme court of the State, under the authority of the 25th section of the judiciary act.

The proceedings now under review were founded upon an indictment in the circuit court of the county of St. Francis, against the plaintiff in error, for having committed waste and trespass on the sixteenth section of lands situated in congressional township number thirty-four, range seven east, as being school lands belonging to the inhabitants of the township aforesaid.

Upon this indictment the plaintiff was convicted, and condemned to pay a fine assessed by the jury, of four hundred dollars, together with the costs of the prosecution. From the judgment of the circuit court, the plaintiff in error having taken an appeal to the Supreme Court of Missouri, by the latter tribunal that judgment was in all things affirmed: the same plaintiff now seeks its reversal here, in virtue of several acts of Congress alleged to be applicable to this case.

Upon the trial in the circuit court, the following facts were either established in proof or admitted by the parties:

1. A joint petition on the part of Jean Batiste Valle, and the

heirs of Francois Valle, Jean Batiste Pratte, and St. Geunne Beauvais, presented on the 15th of October, 1800, to Delassus, the lieutenant governor of upper Louisiana, praying for a grant of two leagues square of land on the river St. Francis, including the mine known by the name of Mine a la Motte, and the lands adjacent.

2. An acknowledgment by the lieutenant governor, dated January 22, 1801, of his want of power to grant a concession of the extent prayed for, and the fact of his having transmitted the petition to the intendant general, with the expression of an opinion favorable to the grant, and to the character of the applicants.

3. An order by the intendant general, that the documents presented in behalf of the petitioners should be translated into the Castilian language, and then be laid before the fiscal agent.

4. A plat and survey for 28.224 arpens, or 24.142 acres of land situated on the river St. Francis, certified by Nathaniel Cook, as deputy surveyor of the district of St. Genevieve, said by him to have been made by virtue of a concession by Delassus to J. B. and Francois Valle, Beauvais, and Pratte, on the 22d of January, 1801.

5. The proceedings of the board of commissioners for the examination of land titles, on the 27th of December, 1811, setting forth the claim of Jean Batiste and Francois Valle, Jean Batiste Pratte and St. Geunne Beauvais, for two leagues of land, including the La Motte mine, founded on the recommendation from Lieutenant Governor Delassus for a concession, bearing date on the 22d of January, 1801, and the order of the intendant general already mentioned, and the rejection of the claim by the commissioners.

6. The first section of an act of Congress approved May 24, 1828, confirming to Francois Valle, Jean Batiste Valle, Jean Batiste Pratte, and St. Geunne Beauvais, their heirs or legal representatives, a tract of land not exceeding two leagues square, situated in the county of Madison, in the State of Missouri, commonly known by the name of the Mine la Motte, according to a field plat and survey made by Nathaniel Cook, deputy surveyor of St. Genevieve, on the 22d day of February, 1806, with a proviso in the said first section that the confirmation thus granted shall extend only to a relinquishment of title on the part of the United States, nor prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation.

7. A plat and survey made by Janifer Sprigg, deputy surveyor, in the months of March, 1829, and August, 1830, of the La Motte Mine tract of land, stated to contain 23,728.02 acres of land, confirmed to Francois Valle, Jean Batiste Valle, Jean Batiste Pratte by an act of Congress approved on the 24th of December, 1828.

8. A patent from the President of the United States, bearing date on the 25th of March, 1839, granted under the authority of the act of Congress last mentioned (and in virtue of a title derived from the confirmees) to Lewis F. Linn and Evariste Pratte for the La Motte Mine and the land surrounding the same, containing 23,728.02 acres of land, in conformity with the survey of Sprigg, as certified from the General Land Office; this patent, containing literally the proviso in the act of Congress, limiting the grant to the patentees to a relinquishment of the title of the United States at the date of the act of Congress of 1828.

9. An admission on the part of the State that all the right, title, and claim of the original proprietors of the Mine La Motte tract of land had regularly passed to and was vested in Thomas Fleming, as fully as those proprietors had or could have had the same.

10. A lease from Thomas Fleming of the 9th of April, 1849, to Ham, the plaintiff in error, for a portion of the Mine la Motte land.

11. An admission further on the part of the State that the sixteenth section claimed as school lands was within the lines of the original survey of the tract made by Nathaniel Cook, and of the other surveys given in evidence.

Upon the trial of the indictment the circuit court, at the instance of the counsel for the State, instructed the jury:

"That the act of the 6th of March, 1820, entitled 'An act to authorize the people of Missouri Territory to form a constitution and State government,' &c., taken in connection with an ordinance declaring the assent thereto by the people of Missouri, by their representatives assembled in convention on the 19th of July, 1820, operated as a grant by Congress to the State of Missouri for the use of schools of the 16th section in controversy, unless such 16th section had been previously disposed of by government.

"That, although the land claimed by the proprietors of Mine la Motte was by the several acts of Congress reserved from sale, and that the survey of said claim includes the 16th section in controversy, yet such reservation is not such disposition of said

section by the government as is within the saving clause of the 6th section of the act of 1820, and cannot operate to prevent the title from vesting in the State by virtue of said grant."

The defendant in the prosecution prayed of the court the following instructions, which were refused:

"That if the jury believe the land in question is included within the original grant by the Spanish government, and within the lines of the survey made by N. Cook in 1806, and within the lines of the lands confirmed by the act of Congress to the original grantees and those claiming under them, then this land never was public land subject or liable to be donated by Congress to the State for the use of schools.

"That the several acts of Congress reserving section 16 for the support of schools could only refer to the public lands proper, and could not attach to private claims which had, previous to such donation, been claimed by individuals and reserved by Congress to satisfy those claims.

"That the confirmation of the claim by the act of Congress of 1828 conferred and gave a superior title to the lands in question over the title of the State for the use of schools."

Upon the accuracy or inaccuracy of the instructions given by the court at the instance of the State, and of those denied by it upon the prayer of the defendant in the prosecution, the decision of this cause must depend.

It would seem not to admit of rational doubt that the act of Congress of March 6, 1820, authorizing the people of the Territory of Missouri to form a constitution and State government, taken in connection with the ordinance of the State convention of the 19th of July, 1820, amounted not merely to a grant for the use of schools of the 16th section of every township of public lands in the territory, but, further, to a positive condition or mandate, so far as Congress possessed the power to impose it, for the dedication of those sections to that object. The assertion of the court, then, of the existence and character of such grant, whilst it recognized any proper limitation or qualification imposed thereon, either by previous acts of Congress or by the investure of any rights arising therefrom, can be obnoxious to no just criticism, but was in all respects proper.

Whether or not the lands claimed by the proprietors of the Mine la Motte, so far as they cover a portion of the sixteenth section of township 34, range 7 east, are exempted from the

operation of the act of March 6, 1820, and of the ordinance of July 19, 1820, must depend upon the correct interpretation of the previous legislation of Congress, and upon the acts and position of the claimants with reference to that legislation.

By the 10th section of the act of Congress approved March 3, 1811, authorizing the President of the United States to offer for sale such portions of the public lands lying in the State of Louisiana, as shall have been surveyed under the direction of the 8th section of the same statute, it is provided that "all such lands, with the exception of section number sixteen, which shall be reserved in each township for the use of schools" (and with the exception, further, of a township of land granted by the 7th section of the same statute for the use of a seminary of learning, and of certain salt springs and lead mines), "shall be offered for sale to the highest bidder, under the direction of the register of the land office, the receiver of public moneys, and principal deputy surveyor."

In this 10th section is contained a proviso, "that till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office for the purpose of being investigated by the commissioners appointed to ascertain the rights of persons claiming lands in the territory of Louisiana.

Upon this 10th section of the act of 1811, and the proviso thereto annexed, is founded the position taken by the plaintiff in error, that the sixteenth section of township 34 did not and could not vest in the State of Missouri, in virtue of the act of March 6th, 1820, and of the ordinance of July 19 of the same year, so far as that section fell within the proviso. In comparing the enacting part of § 10 of the statute of 1811 with the proviso annexed thereto, it will strike the attention that the limitation or restriction contained in the proviso has no connection, by its terms, with lands granted or donated for schools, but relates altogether to such lands as it was designed and declared should be sold at public auction to the highest bidder.

Such, certainly, were not the lands appropriated to a specific, ultimate, and permanent purpose, namely, the support of schools. As to these lands, sales, and every other disposition inconsistent with such dedication, were expressly inhibited. But, putting aside the literal meaning of the 10th section and its proviso, it

may well be asked whether the language and objects of the latter can be made to import anything beyond a temporary suspension of the sales of the lands intented for sale, for the simple purposes of investigation; and much more, whether the 10th section of the act of 1811, and the proviso thereto, can be interpreted to mean a denial to itself by Congress of the right and power to sell or to give, either upon satisfactory evidence of the invalidity of any opposing claim, or upon considerations of public policy, the land embraced within the suspension.

Such an interpretation, as it is not warranted by the language of the acts of Congress, seems not to accord either with considerations of justice or policy. Suppose that Congress, after the passage of the law of 1811, should become satisfied of the groundless nature of a claim presented to the commissioners, and should be convinced further, not only of the benefits to result from appropriating the subject of that claim to purposes of education, but also of their having pledged that subject to such purposes; it cannot be questioned that the power to reject or disregard an unfounded claim, and to comply with a previous and just obligation, remained in a plenary and unimpaired extent in Congress; and that this right and obligation could in no degree be affected by a mere agreement to investigate.

Let it be remembered, too, that the application of those under whom the plaintiff in error deduces his alleged title was for a simple gratuity, founded on no consideration whatever but the bounty of the donor. The opinion and the action by Congress with respect to the rights of the parties to that controversy, seemed to have been entirely coincident with the views herein suggested.

Under the provision of the act of 1811, the proprietors of Mine la Motte presented their claim, together with such evidence as they deemed essential to its support, to the tribunal created by law for the investigation of land titles. By this tribunal the claim of these proprietors was rejected on the 27th of December, 1811. From the period last mentioned until the 24th of May, 1828, an interval of seventeen years, this claim remains dormant or quiescent, when it is confirmed at the date last mentioned.

The nature and effect of this confirmation will presently be considered; but in the interval above mentioned, the government (the undoubted possessor of the title), after the lapse of nine years from the rejection by its agent of this slumbering title, by

express compact with the State of Missouri, grants to that State, for the use of schools, the sixteenth section of every township in the State which had not been sold or "otherwise disposed of."

Upon recurring to the law of May 24, 1828, it will be borne in mind that the confirmation to the proprietors of the Mine la Motte is extended merely to a relinquishment of the title of the United States at the date of that law, and is declared to have no influence to prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation.

It is proper to keep in view this proviso in this confirmation, in order to ascertain its effect, if any, upon the proper meaning of the qualification in the grant to the State of Missouri comprised in the phrase "or otherwise disposed of."

In our construction of the act of Congress of March 3, 1811, we have interpreted the proviso to the 10th section of that act as neither declaring nor importing a final and permanent divestiture, or any divestiture whatsoever, of the title of the United States, but as a provision prescribing a temporary arrangement merely for the purposes of investigation, leaving the title still in the government, to be retained or parted with according to the dictates of justice or policy, as these might be developed by such investigation. Nothing is here ordained which is definite in its character. Inquiry is all that is directed. The language and plain import of the 6th section of the act of the 6th of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase "or otherwise disposed of," must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the act of 1820, and the ordinance of the same year. Upon any other hypothesis, the right to the sixteenth section would attach under the provision of the act of 1820; the State would still have the title, and could recover the section specifically, and there would be no necessity for providing for an equivalent for that section.

Under our interpretation of the acts of March 3, 1811, and of May 24, 1828, no title can have passed to the proprietors of the La Motte Mine lands. The reply of the lieutenant governor, Delassus, to the petition of the applicants for the mine, acknowl-

edges explicitly the absence of all power in that officer to make the grant asked for, and refers those petitioners to the intendant general, as the only functionary possessing authority to make it. This officer took no further action upon the petition than to order its translation into the Castilian language.

On the 27th of December, 1811, this claim was before the commissioners for the examination of land titles in the State of Louisiana, and was rejected by them. From this period of time down to the 24th of May, 1828, no grant from the United States, nor evidences of title from any source, except those already referred to, have been shown by the plaintiff or those under whom he claims. In the meantime, the United States, the undoubted legal owners of the land in controversy, by the act of March 6th, 1820, bestow it on the State, as they had full authority so to do—bestow the specific section, it never having been disposed of within the intent and meaning of the 6th section of the act last mentioned.

The confirmation in 1828, and the patent of the 25th of March, 1839, professing to confer no title but such as remained in the United States at those periods respectively, and the grant of the sixteenth section in township 34, range east, comprised within the survey of the Mine la Motte, having been made seven years anterior to the confirmation, which constitutes the only ground of title in the claimants of the mine, the pretentions of the confirmees to the section in controversy must be regarded as without foundation and utterly null.

The view which this court has taken of the evidence in this cause, and of the law as applicable to that evidence, dispenses with any necessity for an examination *seriatim* of the instructions asked by the plaintiff in error upon the trial of the indictment, and refused by the court. It is sufficient to remark, that the positions assumed in the instructions so prayed for, being incompatible with the law of this case as expounded by this court, we deem those instructions to have been properly refused. It is the opinion of this court, that the decision of the Supreme Court of the State of Missouri, pronounced in this cause, sustaining that of the circuit court, is correct, and ought to be, as it is hereby—

Affirmed.

MR. JUSTICE NELSON:

I concur in the judgment of the court upon the ground that, though the 10th section of the act of March 3, 1811, had the effect

to prevent the title of Missouri to this land from vesting, until the final decision by Congress upon the claim of Valle and others, yet the act of May 24, 1828, confirming lands to Valle and others, operated as such final decision, and, by its true construction, excepted out of the confirmation so much of the land as was included in section sixteen, the public surveys of the township having been made before the passage of the last-mentioned act. I do not know that the opinion of the court is intended to go further than this. If it does, I do not assent thereto.

MR. JUSTICE CURTIS concurred with Mr. Justice Nelson.

MR. JUSTICE GRIER also concurred with Mr. Justice Nelson.

NOTE.—The State is estopped from claiming section 16 where another section has been selected in lieu of it and sold by the State. *State* v. *Dent*, 18 Mo., 313. The same doctrine applied to a railroad company where indemnity had been selected. *Pacific R. R. Co.* v. *Lindell*, 39 Mo., 329. Also, see *Gilmer* v. *Poindexter*, 10 Howard, 257.

JAMES M. COOPER, plaintiff in error, *v.* ENOCH C. ROBERTS.

December Term, 1855.—18 Howard, 173; 1 Miller, 147.

School Lands—Sixteenth Section—Reservation on Account of Minerals.

1. The act of Congress authorizing Michigan to organize as a State, like all other similar acts, granted the sixteenth section of every township to the State for school purposes.
2. When the State accepted this act, the grant became a contract or compact between the State and the United States.
3. As the government extended its surveys, so that the location of these sections was ascertained, the title in the State became complete.
4. Neither a lease made by the United States for mining purposes, nor the acts of Congress of March 1, 1847, and September 1, 1850, were intended to or did impair the title of the State to these sections, nor was the consent of Congress necessary to a valid sale by the State.
5. A trespasser upon one of these sections, claiming a title adverse to that of the State under the compact aforesaid, has no right to inquire into mere irregularities in the mode by which the State sells the land under her own statutes. He has no interest in that question.

WRIT of error to the Circuit Court for the District of Michigan. The case is well stated in the opinion.

Mr. Buel and *Mr. Vinton* for plaintiff in error.

Mr. Truman Smith for defendant.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The plaintiff sued in ejectment, to recover a portion of section No. 16, in township No. 50 north, of range 39 west, lying within the mineral district, south of Lake Superior, in Michigan.

His case affirms that this section had been appropriated by the United States to the State of Michigan, for the use of schools, in their compact, by which that State became a member of the Union; that the governor of Michigan issued, in November, 1851, to Alfred Williams, a patent, evincing a sale of that section under the laws of Michigan, in February, 1851; that he has a conveyance from the patentee, and that the defendant is a tenant in possession, withholding the *locus in quo* from him. The defendant, to support his issue, relies upon a license given in 1844, by the mineral agent of the United States for that district, empowering the donee to examine and dig for lead, and other ores, for the term of one year, and within that term to mark out and define a specific tract of land, not to exceed three miles square, for mining purposes; and, if he should fulfill this and other conditions, he was to become entitled to a lease for three years, with a privilege of one or two renewals, under restrictions. The Secretary of War, in September, 1845, executed a lease for a tract three miles square, which the donee of the license had selected, and which included the *locus in quo*, and stipulated to renew it, if Congress shall not have passed a law "directing the sale or other disposition of these lands," and if the lessee shall have complied with all the conditions of the present lease, and tendered a bond for the fulfillment of the conditions of the new lease, as described in the act. This lease came to the Minnesota Mining Company by assignment, and that company, in 1847, and from thence till 1851, held possession of the land described in the declaration, erected valuable improvements, and made successful explorations for copper upon it. In November, 1850, the company applied to the proper officers of the land office to enter the land comprised in the lease, and from thence till the date of their patent, in 1852, the right of the company to secure the *locus in quo* by entry was in dispute in the land office of the United States. In September, 1851, the Secretary of the Interior determined adversely to the claim of the company, and in favor of the claim of Michigan; and, in 1852, upon proofs that the company had complied with the lease, while he reaffirmed his conclusions in favor of Michigan, allowed the entry of the company, but with a reserva-

tion of the rights of Michigan. The section No. 16 aforesaid, was surveyed in the summer of 1847, and the portion in controversy, in the report of the geological survey of the district, was returned to the land office as containing mines of copper. There was no application to the department of public lands to renew the lease held by the company, for the reason (it is said) that the system of letting mineral lands of this kind had been abandoned, upon the doubts expressed by the attorney general, in 1846, of the legality of such leases. Upon the trial of the cause in the circuit court, the plaintiff moved the court for instructions to the jury, that, upon the facts, he was entitled to a verdict, and that the defendant's patent was invalid. The court refused the prayer, and told the jury "that, by the act of Congress of 1st March, 1847, all the mining lands within the district reported, were taken out of the operation of the general law for the disposal of the public lands, in pursuance of an established policy to reserve from the ordinary mode of disposing of the public lands those that contained valuable salt springs, lead mines, &c., that they might be leased or disposed of to purchasers having full knowledge of their value, by reason of the salt springs or mineral ores they contained, at their full value, for the public benefit. That, by the above act, all the mineral lands reported by the geologist within the district, in pursuance of this settled policy of the government, were appropriated and disposed of without reference to the school reservation, the appropriation of the land being made before the surveys were executed, and before the locality of section 16 could be known. And, as it appears from the report of the geologist that the land in controversy contains valuable minerals, and was within the boundaries of the lease under which the Minnesota Company claim, and that they had made large expenditures thereon for mining, were entitled to the right of purchase, as provided in the third section of the above law; and having paid for the same, it was a disposition of the land which Congress had a right to make, and was an exercise of power within the grant. That the setting apart of another section adjacent, will satisfy the grant to the State."

Our first inquiry will be into the nature of the right of the State of Michigan to section No. 16, in the townships of that State, and the effect of the discovery of minerals in such a section upon that right. The practice of setting apart section No. 16 of every township of public lands, for the maintenance of public schools,

is traceable to the ordinance of 1785, being the first enactment for the disposal, by sale, of the public lands in the western territory.

The appropriation of public lands for that object became a fundamental principle by the ordinance of 1787, which settled terms of compact between the people and States of the Northwestern Territory and the original States, unalterable except by consent. One of the articles affirmed that "religion, morality and knowledge, being necessary for good government and the happiness of mankind," and ordained that "schools and the means of education should be forever encouraged." This principle was extended, first by congressional enactment (1 Stats. at Large, 550, § 6), and afterwards, in 1802, by compact between the United States and Georgia to the Southwestern Territory. The earliest development of this article in practical legislation is to be found in the organization of the State of Ohio, and the adjustment of its civil polity according to the ordinance, preparatory to its admission to the Union. Proposals were made to the inhabitants of the incipient State to become a sovereign community, and to accept certain articles as the conditions of union, which, being accepted, were to become obligatory upon the United States. The first of these articles is: "That the section No. 16 in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools."

A portion of this territory had been encumbered in the articles of cession by the States, and another portion by Congress, for the fulfillment of public obligations prior to the ordinance of 1785, and without reference to the school reservations; therefore uniformity in the appropriation of the section No. 16 was partially defeated. The Southwestern Territory was similarly burdened in the compact of cession by Georgia with the fulfillment of antecedent obligations, and similar paramount obligations have arisen in treaties with the Indian tribes who inhabited it. The rights of private property vested in the inhabitants ceded with Louisiana and Florida, and guaranteed to them in the treaties of cession, created an obstruction to the same policy within them; but the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly-formed States, and the care which Congress has manifested to prevent the accu-

mulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. There is, obviously, a definite purpose declared to consecrate the same central section of every township of every State which might be added to the federal system to the promotion "of good government and the happiness of mankind," by the spread of "religion, morality, and knowledge," and thus by a uniformity of local association to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States before the constitution for the old had yet been modeled. Has the discovery of minerals of value upon this section been deemed a sufficient cause for its withdrawal from the operation of this policy and the compacts which develop it?

The ordinance of 1785 dedicated the section No. 16 for the maintenance of public schools, and in each sale of the public lands there was by the same ordinance a reservation of one-third part of all gold, silver, lead and copper mines within the township or lot sold. No reservations were afterwards made of gold, silver, or copper mines until the acts of March, 1847. By the act of March 26, 1804, and the act of March, 1807, every "grant of a salt spring or a lead mine thereafter to be made, which had been discovered previously to the purchase from the United States, was to be considered as null and void." (2 Stats. at Large, 279, § 6; 449, § 6.) These statutes indicate a policy to withdraw from sale lands containing these minerals; but the compacts have been made without such a reservation, nor has the usage of the land office interpolated such an exception to the general grant of the section No. 16 for the use of schools.

The grant of the section No. 16 for the use of schools can be executed without violating the spirit of the legislation upon salt springs or lead mines; and, as we have seen, no statute prior to the admission of Michigan to the Union contains an appropriation or reservation of other mineral lands. The State of Michigan was admitted to the Union with the unalterable condition "that every section No. 16 in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the State for the use of schools." We agree that, until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true,

the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant; but when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. (*Gaines* v. *Nicholson*, 9 How., 356.)

The question now arises whether the act of March 1, 1847, created a legal impediment to the operation of this principle, either by the reservation of the land for public uses or by its appropriation to superior claims. In March, 1847, Congress established a land district in this region for the disposal of the public lands. It directed a geological survey for the ascertainment of those containing valuable ores, whether of lead or copper, and a report to the land office. It provided for the advertisement and sale of such lands, departing in a measure from that usual mode as to the length of the notice and the amount of price, and in reference to the remainder of the lands it applied the usual regulations. To the section containing these directions (9 Stats. at Large, 146, § 2), there is added an exception from such sales (section No. 16) "for the use of schools, and such reservations as the President shall deem necessary for public uses." It has been argued that this exception is only applicable to the lands not contained in the geological report, and that the mineral lands "were appropriated and disposed of without reference to the school reservation by this section of the act." But it does no violence to the language to embrace within the exception all the sales for which the section provides, and we cannot suppose that Congress could be tempted, with the hope of a small additional price which is imposed upon the purchasers of the mineral lands, to raise a question upon its compact with Michigan, or to disturb its ancient and honored policy. We think the interpretation which claims this as an exception in favor of Michigan is to be preferred to that which excludes her from the mineral lands under this compact; and this conclusion is strengthened by the fact that the power of the President to make useful public reservations is connected in the exception with the school reservations. There could be no reason for limiting the power of the President to a single

class of the public lands and to exclude him from another in the same district. We conclude that this act does not withdraw the mineral lands from the compact with Michigan.

Did the execution of the lease by the Secretary of War, in 1845, before the survey of the lands, dispose of these lands so as to defeat the claim of the State? The Minnesota Mining Company, at the date of the act of March 1, 1847, held the unexpired lease by assignment, and continued to perform its conditions until their patent was issued.

The 3d section of that act authorized the persons in possession under such a lease, who had fulfilled its conditions, to enter in one tract all the land included in it, at a diminished price, "during the continuance of the lease."

The 4th section directed the sale of the mineral lands contained in the report, but with a proviso, that none of the lands contained in any outstanding lease, whose conditions had been fulfilled, should be sold till the expiration of the lease, either "by efflux of time, voluntary surrender, or other legal extinguishment."

The act of Congress of September, 1850 (9 Stats. at Large, 472), abrogated such of the clauses of the act of 1847, which distinguished the mineral from other public lands, and placed them alike under the ordinary system for the disposal of the public domain, but reserved to lessees and occupants the privileges conferred by the act of 1847.

From that time, therefore, the argument "that the mining lands within the district were taken out of the general law for the disposal of the public lands, by the act of March, 1847," lost all its cogency, and the rights of the Minnesota Company depended entirely upon the validity of the lease and the protection accorded to the lessee. The lease expired by "efflux of time" in September, 1848. There was no renewal of the lease, for the double reason that its original validity was doubted by the highest executive authority, and those doubts were submitted to by the lessee, and because Congress had passed the law for the disposal of the mineral lands, which determined the covenant for renewal, by the terms of the lease itself.

Hence, had there been a legal impediment to the execution of the compact with Michigan, erected either by the second section of the act of 1847, which separated for some purposes the mineral from other public lands, or by the privileges granted to lessees or their assigns, in the 3d section of that act, it was removed by the

repealing clause of the act of 1850, and the non-compliance with the conditions on which the privileges depended. The section No. 16 was, at that date, disencumbered, and subject to the operation of the compact, whatever might have been its pre-existing state. That compact had not been fulfilled by an assignment to the State "of equivalent lands, contiguous as may be," under the act of May 20, 1826. (4 Stats. at Large, 179.)

Shortly after the passage of the act of 1850, we find Michigan asserting her claim to this section, advertising it for sale, and selling it to the vendor of the plaintiff. We also find the officers of the land office of the United States denying the right of the Minnesota Mining Company to enter the land, and admitting the superior title of the State of Michigan, and finally reserving those rights in the patent issued to the company.

We entirely concur with these officers in their decision on the subject of contest, for the reasons we have given. We think that the jury should have been instructed, that the section No. 16 was vested in the State of Michigan at the date of the entry by the Minnesota Mining Company, and that the company did not acquire title by its patent.

The defendant insists that the title of the plaintiff is invalid for the reason that the State of Michigan was not empowered by Congress to sell the school reservations. Where such grants have been made to the State, or to the inhabitants of the township for the use of schools, it has been usual for Congress to authorize the sale of the lands, if the State should desire it. (4 Stats. at Large, 138, 237, 298; 5 *Ib.*, 600.)

But this consent was not, perhaps, necessary, and the application for it is but evidence of the strong desire of the State authorities to act in good faith, and to keep within the pale of the law. (4 Ala. R., 622.)

The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance, the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith. We think it was competent to Michigan to sell the school reservations without the consent of Congress.

The defendent further objects, that the officers of the State violated the statutes of Michigan in selling these lands, after they were known, or might have been known, to contain minerals.

Without a nice inquiry into these statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue.

The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached.

Michigan has not complained of the sale, and retains, so far as the case shows, the price paid for it. Under these circumstances, we must regard the patent as conclusive of the fact of a valid and regular sale on this issue.

Upon the whole record, we think the jury should have been instructed, that if they found the facts thus given in evidence to be true, the plaintiff was entitled to recover the premises in question.

Judgment reversed; cause remanded—a venire to issue.

NOTE.—For same case again before Supreme Court, see *Roberts* v. *Cooper*, 20 Howard, 467.

SPRINGFIELD TOWNSHIP, plaintiff in error, *v.* JOHN H. QUICK, auditor, AND WILLIAM ROBESON, treasurer of Franklin Co.

December Term, 1859.—22 Howard, 56.—3 Miller, 235.

School Lands.—Application of the Funds arising from their Sale.

1. The fund arising from the sale of the sixteenth section in each township is, by act of Congress, to be used exclusively for the schools in that township.
2. But an act of the State legislature which, preserving this principle, equalizes the distribution of school funds from other sources among all the townships, including this fund, but in such a manner that none of it is divreted, does not violate the act of Congress, though a township may not get its proportionate share of the fund arising from other sources, by reason of the amount it receives from the sale of its sixteenth section.

WRIT OF ERROR to the Supreme Court of Indiana.

The State of Indiana passed a statute which directed that all the school fund, to which each county was entitled, including that from the sale of the sixteenth section, should be divided among the townships according to the number of children therein. The State court held this unconstitutional, as regarded the fund arising from the sixteenth section. The legislature then amended the law so as to declare that all the funds arising from that source should go exclusively to the township in which the section lay, whereby in some instances an inequality would result in the distribution of the school fund from other sources. The township of Springfield, which did not get a proportion of this latter fund equal to other townships, measured by the number of children, by reason of the larger sum arising from the sale of its sixteenth section, brought this suit to compel an equal distribution of that fund, without regard to the sixteenth-section fund, and the case being decided against it in the State court, brought this writ of error.

Mr. Barbour for plaintiff in error.

Mr. Jones for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

The twenty-fifth section of the judiciary act declares, that where is drawn in question the construction of any statute of the United States, and the decision is against the right set up or claimed by either party under the act of Congress, such decision may be re-examined, and reversed or affirmed, in the supreme court, on writ of error.

Here it is claimed, for the inhabitants of the township, that the fund arising from the proceeds of the sixteenth section shall not be estimated in distributing the general school fund of the State derived from taxes paid into the State treasury. The acts of the legislature equalize the amount that shall be appropriated for the education of each scholar throughout the State, taking into the estimate the moneys derived from the proceeds of the sixteenth section, with the proviso, that the whole of the proceeds shall be expended in the township. If it be more than an equal portion to each scholar elsewhere furnished by the State fund—still, the township has the benefit of such excess, but receives nothing from the treasury; and, if it be less, then the deficiency is made up, so as to equalize according to the general provision.

And the question here is, whether the State laws violate the

acts of Congress providing that the proceeds of the sixteenth section shall be for the use of schools in the township. And our opinion is, that expending the proceeds of the sixteenth section for the exclusive use of schools "in the township" where the section exists, is a compliance with the legislation of Congress on the subject; nor is the State bound to provide any additional fund for a township receiving the bounty of Congress, no matter to what extent other parts of the State are supplied from the treasury.

The law is a perfectly just one; but if it were otherwise, and the school fund was distributed partially, nevertheless those receiving the bounty from Congress have no right to call on this court to interfere with the power exercised by the State legislature in laying and collecting taxes, and in appropriating them for educational purposes, at its discretion.

We hold, that a true construction was given to the acts of Congress referred to, and order that the judgment be—

Affirmed.

NOTE.—The trust created by the grant is a personal trust reposed in the public faith of the State, and is not a property trust, fastened by the terms of the grant upon the land itself, and following it into whose hands soever it may pass. *Franklin Co.* v. *District Court*, 23 Mo., 449.

THE STATE OF MINNESOTA *v.* BACHELDER.

December Term, 1863.—1 Wallace, 109.

1. Neither the act of Congress of 3 March, 1849—the organic law of the Territory of Minnesota, which declared that, when the public lands in that territory shall be surveyed, certain sections, designated by numbers, shall be and "hereby are" "reserved for the purpose of being applied to schools"—nor the subsequent act of February 26, 1857, providing for the admission of that territory into the Union—and making the same reservation for the same object—amounts so completely to a "dedication" in the stricter legal sense of that word, of these sections to school purposes, that Congress, with the assent of the territorial legislature, could not bring them within the terms of the Pre-emption Act of 1841, and give them to settlers, who, on the faith of that act, which had been extended in 1854 to this territory, had settled on and improved them.
2. The decisions of the receiver and register of lands for the Territory of Minnesota, are not of conclusive efficacy. They may be inquired into and declared inoperative by courts.

3. Error will lie to the Supreme Court of a State, under the 25th section of the Judiciary Act, where a statute of the United States is technically in issue in the pleadings, or is relied on in them, and is decided against by rulings asked for and refused, even though the case may have been disposed of generally by the court on other grounds.

THIS was a writ of error to the Supreme Court of the State of Minnesota, and was taken under the 25th section of the Judiciary Act of 1789, which gives a writ of error here in any case where is drawn in question any clause of the constitution, or of a treaty, or statute, or commission, held under the United States, and the decision is against the right, title, privilege or exemption specially set up or claimed by either party under such clause of the constitution, treaty, statute, or commission.

The case was thus: By the act of March 3d, 1849, the organic law of the Territory of Minnesota, it was enacted, "that when the lands in said territory shall be surveyed, sections 16 and 36 shall be and the same hereby are reserved for the purpose of being applied to schools." A subsequent act, that of February 26th, 1857, providing for the admission of this territory into the Union, repeats this enactment, declaring that these same numbered sections of the public lands (and in case either of said sections, or any part of them, has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be) shall be granted to said State for the use of shools.

Notwithstanding this intended devotion to purposes of education of these sections Nos. 16 and 36, Congress, by an act of 1854 (August 4th), declared that the provisions of what is known as the Pre-emption Act of September 4th, 1841, should extend to lands in Minnesota. The result was that great numbers of persons settled all over the State, and not unfrequently settled, in different townships, upon tracts which, when the tracts came to be surveyed, proved to bear the numbers 16 and 36. In consequence of this state of things, the territorial legislature of Minnesota presented (Feb. 26th, 1856) a memorial to Congress for a remedy. The memorial stated that, by reason of the extension of the Pre-emption Act to Minnesota, many settlers had settled and made improvements by the erection of costly buildings and otherwise upon farms, which, when the government surveys were made, were found to be included within the school sections, and that it would be unjust to compel these

persons to repurchase, or lose their improvements thus made in good faith, and with the expectation of a pre-emption of the lot, and recommended the passage of a law which should meet the hardship of such cases. According, on the 3d of March, 1857, that is to say, after the above mentioned act, providing for the admission of the territory into the Union, but before the acceptance of that act by the convention of the State, and so before the actual incorporation of the State into the Union, Congress passed a joint resolution, which provided that, where any settlements by the erection of a dwelling house, or the cultivation of any portion of the land, shall have been or shall be made upon these 16th or 36th sections, before the said sections shall have been or shall be surveyed, &c.; and if such settlers can bring themselves within the Pre-emption Act, then the right of preference to such sections or portions of them so settled and occupied shall be in them, the same as if such sections had not been previously reserved.

The present suit arose, accordingly, out of this condition of the law, and was an ejectment for a tract numbered 16, by the State of Minnesota, in behalf of its schools, against one Bachelder, the defendant, who claimed under the rights given by the joint resolution just above set forth. Bachelder set up, as his defence, pre-emption certificates and a patent, dated August 15, 1857, to two persons of the name of Mills—L. and J. Mills—from whom he showed title to himself.

To this, the plaintiff replied that these had all been obtained by fraud and misrepresentations: that the Millses did not settle on the premises, did not build a house there, nor make any improvements prior to the government survey of the sections; that in granting the papers which he had granted, the register and receiver had been deceived as well by misrepresentations of the Millses as by the false oath of one George Dazner, whom they produced to swear to facts which did not exist, but whose existence was necessary to bring the parties within the Pre-emption Act. But the court, neither on a demurrer by the State of Minnesota to a replication by Bachelder, nor on its offers to prove these facts before a jury, considered them as making a reply to the case of the defendants, as exhibited by his certificates and patents; ruling in effect that the decision of the register and receiver could not be reviewed nor inquired into by the court, and

that the remedy of the State was through the commissioner of said office or the Secretary of the Interior.

The statutes of the United States, devoting the sections to school purposes, were put technically in the pleadings, their binding force relied on by counsel, and pressed upon the court, and rulings under them asked for and refused, and the refusal excepted to; but, although by being set out in the pleadings and exceptions, and by rulings against them, they were technically drawn in question and decided against, yet the actual ground of the decision was as just stated, rather than specially against the statutes.

The correctness of the view taken by the court below, as to the effect of the register and receiver's acts, as also the right of the State to have a writ of error from this court to the Supreme Court of Minnesota, when the statutes of the United States had not been otherwise drawn in question than as mentioned, were now the questions here; the former question being made by the plaintiff in error, the State of Minnesota, and the latter by the other side.

Mr. Cole, A. G., of Minnesota, for the plaintiff:

The joint resolution of Congress is void. It cannot divest a title which the United States had previously granted. The organic act of the territory constituted a dedication to public uses, perpetual and irrevocable, and whatever might have been its effect upon the naked fee, at least divested Congress of all power of disposition over the subject-matter, so far as such disposition should tend to impair the public rights created by that act. The doctrine of dedications was first announced in Strange's Reports, A. D. 1725, and applied to highways. Since then it has been vastly extended. The donations of magnificent domains by Congress, for the promotion of learning and the liberal arts in the rising communities of the west, afford instances not the least striking and interesting of such extension, and have induced more liberal views. Thus the doctrine has in New York been applied to a public square. (*Trustees of Watertown* v. *Cowen*, 4 Paige, 510.) So it has also in Vermont. (*State* v. *Wilkinson*, 2 Vermont, 480.) In the former State it has been extended to a gift for religious purposes (*Hartford Baptist Church* v. *Witherell*, 3 Paige, 296), while in Pennsylvania it reaches any property

devoted to purposes of general education. (*Witman* v. *Lex*, 17 Sergeant & Rawle, 88, 91.)

If dedicated, the power of Congress over it was gone. In *Wilcox* v. *Jackson* (13 Peters, 498), the court say: "Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes reserved from the mass of the public lands, and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it." And in the same case the court signify that "the same principle will apply to any land which, by authority of law, shall have been severed from the public mass."

Neither is the case helped by the memorial from the territorial legislature. The organic act (§ 18), indicates an intention to consecrate these lands for the benefit of the generations who should, in future, inhabit the State; and while divesting Congress of all power of disposition over them, to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said territory, and in the States and territories hereafter to be erected out of the same." They were not granted to the territory, and were in no sense its property.

For the defendant:

The error of the argument is in assuming this to be a "dedication" in the legal meaning of the word. In *Post* v. *Piersoll* (20 Wendell, 119), long since the time of Strange, the Supreme Court of New York decided that a dedication must be confined to a highway. It may have been much extended since, but this is not within the legal meaning of the word.

No writ of error lies here from the Supreme Court of Minnesota, for no statute of the United States has been drawn in question and decided against. The court ruled that it could not go behind the acts of the register and receiver, and so disposed of the case. The fact that the statutes of the United States were presented in the pleadings, and were disposed of adversely by a judgment which was based on other grounds, the argument from the statutes falling in fact only with the case generally, is not enough.

Reply:

Crowell v. *Randall* (10 Peters, 368), decides, "that it is not

necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, but that it is sufficient if it appear by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment." Neither is it necessary that the treaty or act of Congress under which the party claims shall be specially pleaded or spread upon the record. (*Hickey* v. *Starke*, 1 Peters, 94.)

The converse of the rule holds also true. Here the statutes were drawn in question by being on the record and issue so taken to them, or by being made the subject of a request for rulings not given—a fact apparent in the bill of exceptions. When judgment was given against the State or the rulings refused, they were decided "against" in the most exact and authoritative form of legal understanding.

MR. JUSTICE NELSON delivered the opinion of the court.

It is not important to inquire as to the power of Congress to pass this law independently of any application from the territorial legislature, as the assent of the people through their convention by coming into the Union as a State upon the terms proposed must be regarded as binding the State. The right of the State to the school sections within it must, therefore, be subject to the modification contained in the joint resolution, and that modification is, that in case a person shall have made a settlement upon any school section by the erection of a dwelling-house on the same, or the cultivation of any portion of it before the survey; and further, can bring himself within the provisions of the pre-emption act of 1841, he shall be entitled to the section thus improved in preference to any title of the State.

This was the state of the law in respect to these school sections in Minnesota, at the time of the application of L. and J. Mills to the register and receiver for the pre-emption of the premises in question, and of the issuing of the patent certificate by them August 15th, 1857.

As we have seen, the defendant, who claims under L. and J. N. Mills, relies on these patent certificates and the patents issued in pursuance thereof.

To these the plaintiff replies, that they were obtained by fraud and misrepresentation: that L. and J. Mills did not settle on the premises, nor erect a dwelling-house thereon, nor make any

improvements on the same, previous to the survey of the sections by the government; and besides their false representations to the register and receiver, they procured one George Dazner to make a false affidavit as evidence of the settlements, erection of the dwelling-houses and improvements before these officers. The court below refused to give any effect to these facts as set forth in the pleadings, or as offered to be proved on the issues of fact before the jury, and the ground taken to uphold these rulings is, that the decision of the register and receiver and certificates issued were conclusive upon the court, and not revisable or to be inquired into; and that the remedy of the party aggrieved was by an application to the commissioner of the land office or Secretary of the Interior.

These questions have been so often before this court, and were so fully considered in the last case (*Lindsey et al.* v. *Hawes et al.*, 2 Black, 254, 557, 558. See also, *O'Brien* v. *Perry*, 1 *Id.*, 139), where the authorities are collected, that it would be a waste of time to re-examine them.

A court of equity will look into the proceedings before the register and receiver, and even into those of the land office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are *ex parte* and summary before these officers, and no notice is contemplated or provided for by the pre-emption laws as to parties holding adverse interests, nor do they contemplate a litigation of the right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted.

The court below, therefore, erred in their rulings on the demurrer, and also on the trial of the issues in fact.

A point is made under the 25th section of the Judiciary Act, that this court has no jurisdiction to reverse the judgment of the court below. But the right of the State to these school sections rests upon acts of Congress, which were set up and relied on in this case, and the decision of the court below against it.

The judgment of the court below is reversed with costs, and the cause remanded, with directions to enter judgment overruling the demurrer to plaintiff's replications, and to issue *venire de novo*, &c.

Judgment accordingly.

HEYDENFELDT v. DANEY GOLD AND SILVER MINING COMPANY.

October Term, 1876.—3 Otto, 634.

1. At the time of the passage of the Nevada Enabling Act, approved March 21, 1864 (13 Stat., 30), sections 16 and 36 in the several townships in Nevada had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public domain within her limits.
2. The words of present grant in the seventh section of that act are restrained by words of qualification which were intended to protect the proposed new State against loss that might happen through the subsequent action of Congress in selling or disposing of the public domain. If by such sale or disposal the whole or any part of the sixteenth or thirty-sixth section in any township was lost to the State, she was to be compensated by other lands equivalent thereto, in legal subdivisions of not less than one quarter-section each.
3. A qualified person, whose settlement on mineral lands which embrace a part of either of said sections was prior to the survey of them by the United States, and who, on complying with the requirements of the act approved July 26, 1866 (14 Stat., 251), received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the State.
4. The legislative act of Nevada, of February 13, 1867, recognized the validity of the claim of the United States to the mineral lands within that State.

ERROR to the Supreme Court of the State of Nevada.

This is an action of ejectment brought by Heydenfeldt in the District Court of the First Judicial District of Nevada, against the Daney Gold and Silver Mining Company. The case was tried by the court, which found the following facts:

On the fourteenth day of July, 1868, the State of Nevada issued to one William Webelhuth its patent for the west half of the southwest quarter of section 16, township 16 north, range 21 east (lying in Lyon County, State of Nevada), Mount Diablo base and meridian, containing eighty acres, according to the official plat of the survey of public lands as made by the United States surveyor general for the district of Nevada: which said patent was recorded in the recorder's office of the county of Lyon on the twenty-fifth day of July, 1868, and was issued by the State authorities under and by virtue of the statute of Nevada, conveying lands assumed to have been granted to the State by the act of Congress approved March 21, 1864, entitled "An act to enable the

people of the Territory of Nevada to form a State government upon certain conditions."

On the eighteenth day of August, 1873, William Webelhuth, by deed of conveyance duly signed, sealed, and acknowledged, conveyed the same premises to one Philip Kitz, which deed was recorded in the recorder's office of the county of Lyon January 13, 1874.

On the ninth day of January, 1874, Philip Kitz, by deed duly signed, sealed, and acknowledged, conveyed the same premises to this plaintiff, which said deed was duly recorded in the recorder's office of the county of Lyon on the same day.

The defendant is in the possession of the premises. The plaintiff, prior to bringing this action, demanded the possession thereof, but the same was refused.

On the second day of March, 1874, the United States, by its proper authorities, granted to the defendant, by its patent, in due and regular form, lot No. 72, embracing a portion of section 16, in township 16 north, of range 21 east, Mount Diablo meridian, in the Devil's Gate mining district, in the county of Lyon and State of Nevada, in the district of lands subject to sale at Carson City, embracing thirteen (13) acres and seventy-eight one-hundredths (.78) of an acre, more or less, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of the survey of said premises not expressly excepted, and of two thousand linear feet of Mammoth Lode ledge, vein, or deposit for said two thousand feet therein throughout its entire depth, &c., which said grant by the patent covers and includes the lands and premises sought to be recovered by the plaintiff from the defendant in this action, and which said patent was so issued to the defendant under and by virtue of the act of Congress approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public land, and for other purposes:" the act amendatory thereof approved July 9, 1870, and the act approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States."

The land in controversy is mineral land, containing precious metals, and the defendant is in possession and is conducting and carrying on the business of mining thereon, having in the prosecution of mining erected and constructed improvements of the value of over $80,000.

In 1867, and prior to the date of the survey or approval of the sur-

vey of section 16, township 16 north, range 21 east, by the United States, the defendants, grantors, and predecessors in interest had entered upon the premises described by plaintiff in his complaint for mining purposes, and had claimed and occupied the same in conformity to the laws, customs, and usages of miners in the locality and mining district in which said premises are situated, and were so possessed and engaged in mining thereon when the said land was first surveyed, and when the State of Nevada issued its patent as aforesaid to William Webelhuth.

Thereupon, as conclusions of law, the court found—

The act of Congress approved March 21, 1864, enabling the people of the territory of Nevada to form a constitution, &c., under and by virtue of which act the State of Nevada selected the land, and sold and conveyed the same to the predecessors in interest of the plaintiff, did not constitute a grant *in præsenti*, but an inchoate, incomplete grant until the premises were surveyed by the United States, and the survey properly approved.

Said survey and the approval thereof not having been made prior to the entry thereon and claim thereto, by defendant's predecessors in interest for mining purposes, the same was not by said act of Congress, or in any other maner, even granted by the United States to the State of Nevada.

The entry of defendant's grantors thereon for mining purposes, and their rights thereto having become established prior to the survey of said section by the United States, the said premises were not included within, and did not pass to the State of Nevada, by the granting clause contained in said act of Congress of March 21, 1864, but, on the contrary, were excluded therefrom by reason of their having been previously possessed and occupied by defendant's grantors for mining purposes, in conformity with the mining laws, rules, and customs of minors in the locality where the same was situated, and in conformity with the act of Congress approved July 26, 1866, granting the right of way to ditch and canal owners over the public lands, and for other purposes.

Thereupon judgment was rendered for the defendant. The Supreme Court of Nevada having affirmed it, the plaintiff sued out this writ of error.

Submitted on printed arguments by *Mr. W. E. F. Deal* for the plaintiff in error, and by *Mr. C. E. DeLong* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The validity of the patent from the State under which the plaintiff claims title rests on the assumption that sections 16 and 36, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to Nevada for the support of common schools by the seventh section of the Enabling Act, approved March 21, 1864, (13 Stat., 32,) which is as follows:

"That sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools."

This assumption is not admitted by the United States, who, in conformity with the act of Congress of July 26, 1866, (14 Stat., 251), issued to the defendant a patent to the land in controversy, bearing date March 2, 1874. Which is the better title, is the point for decision. As it has been the settled policy of the government to promote the development of the mining resources of the country, and as mining is the chief industry in Nevada, the question is of great interest to her people.

It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Judge Sharswood, "to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction." (Gyger's Estate, 65 Penn. St., 312.)

If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which enduced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular sections of

the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States, which had received the benefit of this bounty. A grant operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the meantime further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor in case it turned out that they had settled upon the specified sections. Congress was fully advised of the condition of Nevada, of the evils which such a measure would entail upon her, and of all antecedent legislation upon the subject of the public lands within her bounds. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. It is ambiguous; for its different parts cannot be reconciled, if the words used receive their usual meaning. *Schulenberg* v. *Harriman*, 21 Wall., 44, establishes the rule that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense." We do not seek to depart from this sound rule; but, in this instance, words of qualification restrict the operation of those of present grant. Literally construed, they refer to past transactions: but evidently they were not employed in this sense, for no lands in Nevada had been sold or disposed of by any act of Congress. There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress cannot be supposed to have intended a vain thing, and yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain.

It could not, as we have seen, apply to past sales or dispositions, and, to have any effect at all, must be held to apply to the future.

This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the 16th and 36th sections in each township. Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them, and, if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests.

It is argued that, conceding the soundness of this construction, the defence cannot be sustained, because the land in controversy was not actually sold by direction of Congress until after the survey. This position ignores a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand if possible. (1 Bouv. Inst., p. 42, sect. 7.) The language used is, "sold or otherwise disposed of by any act of Congress." The point made by the plaintiff would reject a part of these words and defeat one of the main purposes in view. Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that lands containing it should be disposed of differently from those fit only for agriculture. No method for doing this had then been provided: but Congress said to the people of the territory, "You shall, if you decide to come into the Union, have for the use of schools sections numbered 16 and 36 in every township, if on survey no one else has any valid claim to them; but until this decision is made, and the lands are surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment. If they are sold or disposed of you shall have other lands equivalent thereto." The right so reserved is subject to no limitation, and the wisdom of not surrendering it is apparent. The whole country

is interested in the development of our mineral resources, and to secure it adequate protection was required for those engaged in it. The act of Congress of July 26, 1866, *supra*, passed before the land in controversy was surveyed, furnishes this protection by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant and those under whom it claims occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims.

These views dispose of this case; but there is another ground equally conclusive. Congress, on the 4th of July, 1866 (14 Stat., 85), by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of Feb. 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the government of the United States to the mineral lands."

It is objected that the constitution of Nevada inhibited such legislation; but the Supreme Court of the State, in the case we are reviewing, held that it did not (10 Nev., 314); and we think their reasoning on this subject is conclusive.

Judgment affirmed.

BEECHER v. WETHERBY.

October Term, 1877.—5 Otto, 517.

1. It was an unalterable condition of the admission of Wisconsin into the Union, that, of the public lands in the State, section 16 in every township, which had not been sold or otherwise disposed of, should be granted to her for the use of schools.

2. Whether the compact with the State constituted only a pledge of a grant *in futuro*, or operated to transfer to her the sections as soon as they could be identified by the public surveys, the lands embraced within them were set apart from the public domain, and could not be subsequently diverted from their appropriation to the State. If any further assurance of title was required, the United States was bound to provide for the execution of proper instruments transferring to the State the naked fee, or to adopt such other legislation as would secure that result.
3. The right of the Menomonee Indians to their lands in Wisconsin was only that of occupancy; and, subject to that right, the State was entitled to every section 16 within the limits of those lands.
4. The act of Congress approved February 6, 1871, (16 Stat., 404), authorizing a sale of the townships set apart for the use of the Stockbridge and Munsee Indians, and originally forming a part of the lands of the Menomonees, does not apply to sections 16.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was replevin by Beecher to recover from Wetherby, James, and Stille, saw-logs, cut and taken by them during the winter of 1872 and 1873, from section 16, township 28, range 14 east, in Wisconsin. The plaintiff asserts title to the land under patents from the United States bearing date October 10, 1872; and the defendants, under patents from that State of December 15, 1865, and September 26, 1870.

Under the eighth article of the treaty of August 19, 1825 (7 Stat., 272), the Menomonee lands were declared to be "bounded on the north by the Chippewa country, on the east by Green Bay and Lake Michigan, extending as far south as Milwaukee river, and on the west they claim to Black river." The lands in question are embraced in this tract.

A treaty concluded with the Menomonees February 8, 1831 (7 Stat., 342), confirming those boundaries, was ratified by the Senate, with a proviso that two townships on the east side of Winnebago Lake should be ceded for the use of the Stockbridge and Munsee Indians.

By a treaty concluded October 18, 1848, and ratified January 23, 1849 (9 Stat., 952), the Menomonees agreed to cede to the United States all their lands in Wisconsin. The eighth article stipulated that they should be permitted to remain on the ceded lands for the period of two years, and until the President should notify them that the same were wanted.

The act to enable the people of Wisconsin Territory to form a constitution and State government, and for the admission of such State into the Union, approved August 6, 1846 (9 Stat., 56), provides "that section numbered 16 in every township of the public lands in said State, and, when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

The convention called to form a constitution, on the first day of February, 1849, accepted the proposition contained in the organic act. (Rev. Stat. Wis., 1849, p. 45.) By an act entitled "An act for the admission of the State of Wisconsin into the Union," approved May 29, 1848 (9 Stat., 233), such acceptance was assented to by Congress.

A joint resolution or the legislature of Wisconsin, approved February 1, 1853 (Gen. Laws of Wis., 1853, p. 110), gives the assent of that State "to the Menomonee nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit: Commencing at the southeast corner of town 28 north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles to the place of beginning."

On the 12th of May, 1854 (10 Stat., 1064), a treaty was made with the Menomonees, "supplementary and amendatory" to that ratified January 23, 1849, wherein it is recited that, "upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi river, &c., which had been assigned to them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto rivers:" and, "to render practicable the stipulated payments therein recited, and to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into."

By the second article of said treaty, the following-described tract lying on Wolf river in the State of Wisconsin was ceded to the Indians to be held as Indian lands are held: "Commencing at the southeast corner of township 28 north, range 16 east, 4th principal meridian, running west twenty-four miles, thence north

eighteen miles, thence east twenty-four miles, thence south eighteen miles to the place of beginning, the same being townships 28, 29, and 30 of ranges 13, 14, 15, and 16, according to public survey."

Under an act of Congress approved February 6, 1871 (16 Stat., 404), entitled "An act for the relief of the Stockbridge and Munsee tribe of Indians in the State of Wisconsin," the two townships set apart for their use, including the section upon which the logs were cut, and forming a part of the Menomonee lands, were sold by the United States, and the plaintiff deraigns title under its patents.

The exterior lines of the township in which the land in question is situate were run in October, 1852, and the section lines in May and June, 1854.

There was a judgment for the defendants. The plaintiff then brought the case here.

Mr. Charles W. Felker for the plaintiff in error.

The act was in the nature of an executory agreement, and by its terms no title to sections numbered sixteen could vest in the State until they were surveyed and designated on the plats filed in the surveyor general's office. The sectional or subdividing lines of the township in question were not run prior to the treaty of May 12, 1854.

The proviso to the act implies a reserved power in the government to sell or dispose of sections 16 while they remained a part of the public domain, and that treaty did not reserve any section, but appropriated the entire tract as a reservation, and vested the title thereto in the Indians. (*Meade* v. *United States*, 2 Ct. of Cl., 224; *United States* v. *Brooks*, 10 How., 442.)

The State took title to none but public land. Land like that in question, continuously and rightfully in the occupation of an Indian tribe under authority of the government, is not "public" within the meaning of the grant. Mr. Justice Davis, in *Newhall* v. *Sanger*, 92 U. S., 761, justly remarked, that the words "public land" "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The treaty ratified January 23, 1849, allowed the Indians to remain upon the lands for two years, and until the President should give notice that they were wanted. His subsequent act setting them apart as a reservation was a specific appropriation of them.

Not having then been surveyed, no right of the State to sections

16 within the reservation vested, and they have never since become "public lands." (*Wilcox* v. *Jackson*, 13 Pet., 498; *Cooper* v. *Roberts*, 18 Howard, 173; *Leavenworth, &c., Railroad Company* v. *United States*, 92 U. S., 733; *Spaulding et al.* v. *Martin*, 11 Wis., 262.)

The cession to the United States of two townships in the reservation does not affect the principle contended for; they were in fact ceded for a reservation for the Stockbridge and Munsee Indians, and did not become a part of the public lands. Neither is it material that they were by the act of February 6, 1871, directed to be sold for the benefit of those Indians. The relation of the United States to the property is the same. (16 Stat., 404; *Leavenworth, &c., Railroad Co.* v. *United States, supra.*)

Cooper v. *Roberts*, 18 How., 173, is not in conflict with these views. There the lands had not been legally appropriated by the government before the title of the State vested.

The position that the title did not vest in the State until the lands were surveyed and the townships subdivided is not affected by the fact that the subdivision was made in June, 1854, before the treaty of May 12 was ratified by the Senate August 2 of that year. The rights of no innocent third parties intervening, the treaty took effect by relation from the day of its date. (*United States* v. *Arredondo*, 6 Pet., 691.)

It cannot be claimed that the defendants are innocent purchasers. The patents under which they claim were issued, the one over eleven and the other over sixteen years after that treaty was made, and they bought with knowledge of it.

If it should be held, however, that the survey was made before that treaty was concluded, the eighth article of the treaty of October 18, 1848, and the acts of the President subsequent thereto, were a legal impediment to the vesting of any title in the State.

But if the State ever had any interest, contingent or otherwise, in section 16 in each township of this Indian reservation, such interest was waived by the resolution of the legislature of February 1, 1853. An estoppel is available against the State. (Bigelow Estoppel, 276, 277, and cases cited.)

Mr. W. P. Lynde and *Mr. Charles Barber contra.*

The act of Congress of August 6, 1846, did not constitute a present grant, but was in the nature of an executory agreement. (*Rutherford* v. *Greene's Heirs*, 2 Wheat., 196; *Cooper* v. *Roberts*,

18 How., 173; *Schulenberg* v. *Harriman*, 21 Wall., 44; *Leavenworth, &c., Railroad Co.* v. *United States*, 92 U. S., 733; *Sherman* v. *Buick*, 93 *Id.*, 209; *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, *Id.*, 634; 8 Opin. Att'y Gen., 260; *Houghton* v. *Higgins*, 25 Cal., 255.)

At the time of the survey in October, 1852, and the subdivision in May and June, 1854, no legal impediment existed to the complete investiture of the title of the State. (*Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, *supra*.)

The fee to the land was in the United States, subject, in respect to a part, to the right of occupancy by the Menomonees, when Congress passed the enabling act of 1846. It was the obvious intention that the grant should be executed from time to time as that right was extinguished, and the surveys designated the sections.

From the origin of the government it had been settled that the United States might make a valid grant of lands to which the Indian right had not been extinguished, and that such a grant passed the title subject to that right. (*Fletcher* v. *Peck*, 6 Cranch, 87; *Clark* v. *Smith*, 13 Pet., 195; *The Cherokee Nation* v. *Georgia*, 5 Pet., 1; *Johnson* v. *McIntosh*, 8 Wheat., 543; 8 Opin. Att'y Gen., 262; *Veeder et al.* v. *Guppy*, 3 Wis., 502.)

The argument of the plaintiff that the joint resolution of 1853 operated as a grant of the sixteenth section is based upon the assumed fact that the title was then in the State. Even if this were correct, the joint resolution is for the following, among other reasons, unconstitutional and void: First, because in Wisconsin such a resolution is simply an expression of opinion, binding on no one, and without the force of law. (Const. of Wis., art. 4, sect. 1; Cooley Const. Lim., 130, 131.) Second, because it does not contain the enacting clause required by the constitution of the State, and is not a bill. (Const. of Wis., art. 4, sect. 17; Rev. Stat. Wis., 1858, p. 30.)

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action of replevin brought by the plaintiff to recover two million feet of pine saw-logs of the estimated value of $25,000, alleged to be his property, and to have been wrongfully detained from him by the defendants. The complaint was in the usual form in such cases, and the answer consisted of a general denial of its averments. The logs were cut by the de-

fendants from the tract of land in Wisconsin which constitutes section sixteen (16), in township twenty-eight (28), range fourteen (14), in the county of Shawano, in that State. The plaintiff claimed to be the owner of the logs by virtue of sundry patents of the land from which they were cut issued to him by the United States in October, 1872. The defendants asserted property in the logs under patents of the land issued to them by the State of Wisconsin in 1870. The question for determination, therefore, is which of these two classes of patents, those of the United States or those of the State, transferred the title. The logs were cut in the winter of 1872 and 1873; they were, therefore, standing timber on the land when all the patents were issued, and as such constituted a portion of the realty. Although when severed from the soil the timber became personalty, the title to it remained unaffected. The owner of the land could equally, as before, claim its possession, and pursue it wherever it was carried.

The State asserted title to the land under the compact upon which she was admitted into the Union. The act of Congress of August 6, 1846, authorizing the people of the Territory of Wisconsin to organize a State government, contained various propositions respecting grants of land to the new State, to be submitted for acceptance or rejection to the convention which was to assemble for the purpose of framing its constitution. Some of the proposed grants were to be for the use of schools, some for the establishment and support of a university, some for the erection of public buildings, and some were to be of lands containing salt springs. They were promised on condition that the convention should provide by a clause in the constitution, or by an ordinance irrevocable without the consent of the United States, that the State would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations Congress might find necessary for securing the title in such soil to *bona fide* purchasers; that no tax should be imposed on lands the property of the United States, and that in no case should non-resident proprietors be taxed higher than residents. And the act provided that if the propositions were accepted by the convention and ratified by an article in the constitution, they should be obligatory on the United States. The first of these propositions was: "That section numbered sixteen (16) in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous

as may be, shall be granted to said State for the use of schools."

The convention which subsequently assembled accepted the propositions, and ratified them by an article in the constitution, embodying therein the provisions required by the act of Congress as a condition of the grants. With that constitution the State was admitted into the Union in May, 1848. (9 Stat., 233.) It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterward identified by the public survey. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

In *Cooper* v. *Roberts*, 18 How., 173, this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. "We agree" said the court, "that, until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no

legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others." In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation. The plaintiff contends that there had been a prior reservation of the land to the use of the Menomonee tribe of Indians.

It is true that, for many years before Wisconsin became a State, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power.

The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. It was so ruled in *Johnson* v.

McIntosh, 8 Wheat., 543, in 1823; and in *United States* v. *Cook*, 19 Wall., 591, in 1873. Other cases between those periods have affirmed the same doctrine. (*Clark* v. *Smith*, 13 Pet., 195. See also *Jackson* v. *Hudson*, 3 Johns. N. Y., 375; *Veeder et. al.* v. *Guppy*, 3 Wis., 502; and 8 Opin., Att'y Gen., pp. 262–264.) In *United States* v. *Cook*, the United States maintained replevin for timber cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted. But, added the court, "the right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In the construction of grants supposed to embrace land in the occupation of Indians questions have arisen whether Congress intended to transfer the fee or otherwise; but the power of the United States to make such transfer has in no instance been denied. In the present case there can hardly be a doubt that Congress intended to vest in the State the fee to section 16 in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was at the date of the compact occupied by different tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, "its ancient and honored policy" of devoting the central section in every township for the education of the people. Accordingly, soon after the admission of the State into the Union, means were taken for the extinguishment of the Indian title. In less than eight months afterwards the principal tribe, the Menomonees, by treaty ceded to the United States all their lands in Wisconsin, though permitted to remain on them for the period of two years, and until the President should give notice that they were wanted. (9 Stat., 952.)

It is true that subsequently the Indians, being unwilling to

leave the State, the President permitted their temporary occupation of lands upon Wolf and Oconto rivers, and in 1853 the State gave its assent to the occupation; and in May, 1854, the United States by treaty ceded to them certain lands for a permanent home, the treaty taking effect upon its ratification in August of that year: and afterwards a portion of these lands was by another treaty ceded to the Stockbridge and Munsee tribes. But when the logs in suit were cut those tribes had removed from the land in controversy, and other sections had been set apart for their occupation.

The act of Congress of February 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of sections 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.

It follows that the plaintiff acquired no title by his patents to the land in question, and, of course, no property in the timber cut from it. *Judgment affirmed.*

NOTE.—See *Minter* v. *Shirley*, 45 Miss., 376, and *Ballou* v. *O'Brien*, 20 Mich., 304.

The act of June 23, 1836, admitting the State into the Union, and granting lands to the State for public schools, was an absolute grant, and the act of Congress of March 3, 1843, imposing conditions upon the power of sale by the State is not binding on the State. *Mayers* v. *Byrne*, 6 Barb. (Ark), 308.

The act of May 30, 1854, organizing the territory, reserved sections 16 and 36 in each township for school purposes. This reservation operated as a grant of the lands to the territory, and under the grant the land could be sold under a law of the territory, before the State was admitted into the Union. *State* v. *Strangfellow*, 2 Kan., 263; *Stout* v. *Hyatt*, 13 Kan., 232.

Lands were not excepted from the grant because they were covered by a private land claim which was finally rejected (*Thompson* v. *True*, 48 Cal., 601); or because they contained minerals. *Higgins* v. *Houghton*, 25 Cal., 252.

WATER AND MINING COMPANY *v.* BUGBEY.

October Term, 1877.—6 Otto, 165.

1. The act of March 3, 1853 (10 Stat., 244), granted for school purposes to California the public lands within sections 16 and 36 in each Congressional township in that State, except so much of them whereon an actual settlement had been made before they were surveyed, and the settler claimed the right of pre-emption within three months after the return of the plats of the surveys to the local land office.[1] If he failed to make good his claim, the title to the land embraced by his settlement vested in the State as of the date of the completion of the surveys.
2. In this case, the title of the State to the demanded premises, being part of a school section, having become absolute May 19, 1866, a mining company could, under the act of July 26, 1866 (14 Stat., 253), acquire no right to them.

ERROR to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

Mr. Samuel Shellabarger and *Mr. J. M. Wilson* for the plaintiff in error.

Mr. Aaron A. Sargent contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was an action of ejectment, brought by Bugbey, the defendant in error, against the Natoma Water and Mining Company, the plaintiff in error, to recover possession of a part of the south half of section 16, township 10 north, of range 8 east, Mount Diablo base and meridian, in the State of California.

He claimed title by grant from the State, and the company under the act of Congress of March 3, 1853, "to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat., 244), and the act of July 29, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes" (14 Stat., 251.)

The decision of the Supreme Court of California having been against the title set up by the company, this writ of error was brought. The facts affecting the federal question in the case are as follows:

In 1851, the company commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States, for the purpose of supplying water to miners and others.

This canal was completed, at large expense, in April, 1853, and the premises in controversy are included within its limits.

By the act of March 3, 1853, (10 Stat., 244), Congress provided for the survey of the public lands of California, and granted sections 16 and 36 to the State, for school purposes. By section 7 of this act, it was provided, "that where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made on the sixteenth and thirty-sixth sections, before the same shall be surveyed, * * * * other land shall be selected by the proper authorities of the State, in lieu thereof, agreeably to the provisions of the act of Congress approved May 20, 1826, * * *" (4 Stat., 179.)

The survey of the lands in controversy was completed May 19, 1866, and the plats deposited in the United States land office for the district June 16, 1866. At that time, Bugbey was an actual settler upon the legal subdivision of the section 16 in which the premises are situated, and had thereon a dwelling-house, and agricultural and other improvements. He made no claim under the pre-emption laws of the United States.

Other persons were also in posession of other portions of the section. The act of 1853 required (sect. 6) that, "where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of the surveys to the land offices." On the 28th of September, 1866, the register of the United States land office certified to the State land office that no claim had been filed to this section 16, except the pre-emption of one Hancock, which was afterwards abandoned.

Sect. 9 of the act of July 26, 1866, (14 Stat., 253), is as follows:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed. * * *"

The company has brought itself within the provisions of this section, if at the time of the passage of the act the United States held title to the lands.

On the 22d of April, 1867, Bugbey purchased the portion of the section on which the premises in controversy are situated from the State of California, and took a patent. The company does

not in any manner connect itself with this title, or with that of any other occupant of the section previous to the survey.

In *Sherman* v. *Buick* (93 U. S., 209), it was decided that the State of California took no title to sections 16 and 36, under the act of 1853, as against an actual settler, before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case, the State must look for its indemnity to the provisions of sect. 7 of the act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute. The language of the court is (p. 214): "These things [settlement and improvement under the law] being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and, it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it, she had acquired the right to select other land, agreeably to the act of 1826."

In that case, the controversy was between the settler, who had perfected his title from the United States, and a purchaser from the State.

Here the company does not come under the settler's title, but seeks, by means of it, to defeat that of the State, and thus leave the land in a condition to be operated upon by the act of July 26 The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute, as of May 19, 1866, when the surveys were completed.

The case stands, therefore, as if at that date the United States had parted with all interest in and control over the property. As the act of July 26 was not passed till after that time, it follows that it could not operate upon this land in favor of the company

This disposes of the only federal question in the record.

Judgment affirmed.

NOTE.—[1] *Held*, same in *Damrell* v. *Meyer*, 40 Cal., 166; *Megerle* v. *Ashe*, 47 Cal., 632; *Athearn* v. *Poppe*, 42 Cal., 606; and there is no authority in the land department to dispense with this requirement. (*Megerle* v. *Ashe*, 33 Cal., 74.)

HUFF v. DOYLE ET AL.

October Term, 1876.—3 Otto, 558.

1. The act of Congress of July 23, 1866 (14 Stat., 218), confirming selections theretofore made by California of any portions of the public domain, divided them into two classes, namely, one in which they had been made from land surveyed by the United States before the passage of the act, and the other in which the selected lands had not been so surveyed
2. Where the surveys had been made before the passage of the act, it was, by the second section thereof, the duty of the State authorities to notify the local land officer of such selection, where they had not already done so Such notice was regarded as the date of such selection.
3. Where the surveys had not yet been made, the State, under the third section, had the right to treat her selection made before the passage of the act as a pre-emption claim, and the holder of her title was allowed the same time to prove his claim under the act after the surveys were filed in the local land office as was allowed to pre-emptors under existing laws.
4. By a fair construction of these provisions and others of this statute, and of the act of March 3, 1853 (10 Stat., 244), the exception in the first section confirming these selections of lands "held or claimed under a valid Mexican or Spanish grant" must be determined as of the date when the claimant, under a State selection, undertakes to prove up his claim after the surveys have been made and filed, and within the time allowed thereafter to pre-emptors.
5. If at that date the land selected by the State was excluded from such a grant, either by judicial decision or by a survey made by the United States, the claimant may have his claim confirmed.

ERROR to the Supreme Court of the State af California.

Submitted on printed arguments by *Mr. John B. Harmon* for the plaintiff in error, and *Mr. S. F. Lieb contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of California, which brings here for review a judgment of that court concerning a title to land dependent on the act of Congress granting lands to that State for school purposes of March 3, 1853, and the act of July 23, 1866, on the same subject. (10 Stat., 244; 14 *Id.*, 218.)

By the sixth section of the first-mentioned act, the State was granted every sixteenth and thirty-sixth section of the public land for school purposes, with an exception of lands which for

various reasons ought not to be so granted, and by the seventh section the State was authorized to select other lands in lieu of any section or part of section sixteen or thirty-six which fell within any of these exceptions. The act which made these grants was the first which provided for the extension to California of the system of surveys, sales, and pre-emption of public lands so long established in other States and territories. No surveys had then been made, and it was obvious that until they were made, and the precise locality of each township, and of the sixteenth and thirty-sixth sections of the township, was thus ascertained, it could not be known whether they came within any of the exceptions to the grant or whether any right of selection in lieu of them had accrued. The State of California, impatient of the delay of the United States authorities in making these surveys, undertook to perform that duty herself, and assuming from data furnished by her own surveys, that a great many acres of the sixteenth and thirty-sixth sections were within one or the other of the exceptions of the granting clause, for which the State was to select other lands, the legislature authorized selections and locations to be made in lieu thereof, according to State surveys. The land in controversy was so selected by the State and sold to plaintiff, who settled on it in 1865, and received from the State a certificate of sale.

The officers of the land department, when the matter was brought to their attention, refused to recognize the surveys made by the State, or to acknowledge the validity of selections and locations made under the State laws, and as many such selections and actual settlements under them had been made, the hardships and embarrassments growing out of the action of the State government, caused the passage of the act of July 23, 1866.

By the first section of that act it was declared "that in all cases where the State of California has heretofore made selections of any portion of the public domain, in part satisfaction of any grant made to said State by act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and are hereby, confirmed to said State."

A proviso excepted out of this confirmation land of various classes, among which is "any land held or claimed under a valid Mexican or Spanish grant." Section two of the act required the proper land officers, where the land had been surveyed by the United States at the date of the act, to examine into these selections, and if found to be right, to certify them to the State; and

by the third section provision was made for the perfection of these titles in lands not yet surveyed, after the surveys should have been extended over them.

The land claimed by plaintiff belonged to the latter class, and the official plat of the survey of the township embracing it was not filed in the proper land office of the United States until June 28, 1871, nearly five years after the passage of the act, and six years after its selection and location by plaintiff. As soon as this was done, to wit, July 10, 1871, plaintiff proved up his claim, and the land office certified the land to the State of California, as provided by the third section of the act, and the State thereupon issued to him his patent. It is upon this title that plaintiff recovered a judgment for the possession of the land in the inferior court of the State of California against defendants, whose claim consisted in the facts found by the court, that having the qualifications of pre-emptors of the public land, they had, in November, 1870, intruded upon the possession of plaintiff, had made a declaration of their intention to pre-empt it, and had offered to pay the money and demanded a certificate of sale, the land officers refusing both to accept their money and to give them a certificate.

The Supreme Court of California reversed this judgment, and ordered a judgment for defendants, on the ground that at the time of plaintiff's selection of this land, and of the passage of the act of 1866, it was claimed under a valid Mexican grant.

To determine the correctness of this ruling it will be necessary to look into the history of that claim.

It appears that at some time prior to 1860 there was confirmed to Robert Livermore a grant of two leagues of land, called Los Pocitas, the outboundaries of which were given in the decree of confirmation, and which included the land now in controversy. In 1865 a survey of this grant was made, which contained nine leagues, and which was rejected for that reason by the Commissioner of the General Land Office in 1868. In March, 1869, another survey was made, which contained two square leagues, and did *not* include the land in suit, and this survey was confirmed by the commissioner June 6, 1871. It will be remembered that on the 28th of the same month, the plat of the government surveys was filed in the local land office, and that twelve days thereafter plaintiff presented himself at that office and proved up his claim.

The question for our decision under the facts as found by the

court below and thus more briefly stated, is whether the action of the officers of the land department in certifying these lands to the State as a valid selection of indemnity lands under the act of 1866, was without authority of law, and therefore void. There can be no doubt that they were authorized to inquire into the validity of any claim set up under section one of that act, and, in the language of the closing paragraph of section three, "if found in accordance with section one," to certify the land to the State. And it may admit of grave doubt whether in a suit at law the validity of their action can be impeached. It certainly cannot be impeached on any other ground found in this record than that being part of a valid Mexican claim, the land was expressly excepted from confirmation, and could not be subjected to it by the act of the land officers in the premises.

It is not to be denied that the facts found show that at the date of the act of 1866 the land claimed by defendant was part of a tract claimed under a Mexican grant, and that the grant itself was then and is still conceded to be a valid grant. It was, therefore, "claimed under a valid Mexican grant," within the literal terms of the statute. And if this literal construction is to prevail, and the fact of its being claimed under a Mexican grant is to have reference solely to the date of the statute, the Supreme Court of California was right in its decision.

But we see no reason, in the nature of the relief granted by this statute, or in the exception of land covered by Mexican claims, which should make the exception cover land to which no Mexican claim existed at the time the land officers were to decide on the validity of the selection of the State. If there was *then* no claim, or if it had been judicially determined that it was not valid, the remedial spirit of the statute required that the *bona fide* purchaser from the State should be at liberty to assert his claim to it, as a selection made by the State, and no principle of public policy was infringed by so doing.

That this was the intention of Congress is fairly deducible from other parts of the statute.

As we have already said, section two has reference to lands which had been surveyed by the government at the date of its passage. As to these lands it is made "the duty of the proper authorities of the State, where this is not already done, to notify the register of the United States land office for the district in which the land is located, of such selection, *which notice shall be*

regarded as the date of the selection." Now, suppose that prior to this notification the land had been claimed as part of a Mexican grant, but it had been finally determined that, though the grant itself was valid, it did not include the land selected, would not the selection be good? How could it be otherwise when, at the time which the statute says shall be regarded as the date of the selection, the land was to all intents and purposes restored to the body of the public lands of the United States by the terms of a statute on that subject? (Sect. 13, act of March 3, 1851; 9 Stat., 633.)

The reasons why this proposition should prevail as to lands not surveyed at the date of the act are quite as strong, and we find accordingly that the third section declares that as to these the selection made under the authority of the State shall have the same force and effect as the pre-emption rights of a settler on the unsurveyed land, and that the holder of the State title shall be allowed the same time after the surveys are made and the plat filed to prove up his purchase and claim as is allowed to pre-emptors under existing laws, "and if found in accordance with section one of this act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office."

If found *then* to be in accordance with section one, the register is to examine his claim, the character, the right asserted, and the certificates under which he claims. He is also to see if it is land subject to be so selected, or land which is excepted from the right of selection. If the papers are right is he to go back to some past time and say this land was part of a Mexican claim, though not so now, and reject the application? Or is he to say your papers are all right, the land is public land and open to your claim? If he should doubt on this point, he has but to look to the previous section, where Congress has declared that though the land may have been actually selected under State authority years before, yet the *date* of selection, for the provisions of that act, shall be determined by the notice of the fact at the land office, delivered after the passage of the statute. (See *Toland* v. *Mandell*, 38 Cal., 42–3.)

As strongly tending to the same conclusion we find that by the sixth section of the act the right of the State to solicit indemnity for school sections included, or supposed to be included, in a Mexican grant, accrues only when it shall be found by a final survey of the grant that it does include some part of a sixteenth or thirty-sixth section.

So, also, as we held at this term, in the case of *Sherman* v. *Buick*, *supra*, that by the seventh section of the act of 1853 the right of selecting indemnity lands for those on which actual settlements were made must be determined by the actual survey of the grant, and of course could not be exercised before that time, and that up to that time a valid settlement could be made which would deprive the State of the land, though made on what turned out to be a sixteenth or a thirty-sixth section.

In all this we see the purpose of Congress to refer the exercise of the right of the State to select indemnity for school lands to the condition of the lands for which indemnity is claimed, as well as those out of which it is sought, at the time the official surveys are made and filed in the proper office, or as soon thereafter as the right is asserted.

There is in what we have here said no conflict with the principles laid down in *Newhall* v. *Sanger*, 92 U. S., 761.

In that case the claim under the Mexican grant called Moquelamos was still in litigation when the road of the company was located, and when the lands were withdrawn from public sale. These lands were not *then* public lands within the meaning of the grant under which the corporation claimed.

Here, as we have attempted to show, the land in controversy was public land at the time at which by the statute, the State was authorized to assert her right of selection. It is upon the language of the act of 1866, and its special provisions that we hold that the extent of the Mexican claim having been determined, and all land outside of the final survey restored to the body of the public lands, the State had a right at the time plaintiff proved up his claim to treat it as public land, and have the claim confirmed.

Upon these views we are of opinion that the land in controversy was rightfully certified to the State by the land officers, and that the title of the plaintiff is perfect.

The judgment of the Supreme Court of the State of California is, therefore, reversed, and the cause remanded with directions to affirm the judgment of the District Court of the Third Judicial District, County of Alameda.

MR. JUSTICE DAVIS took no part in the decision of this case.

ARTHUR MORGAN FOLEY, plaintiff in error, *v.* SAMUEL T. HARRISON, defendant, and LOUIS LESASSIER, intervenor.

December Term, 1853.—15 Howard, 433; 20 Curtis, 589.

The eighth section of the act of September 4, 1841 (5 Stats. at Large, 455), granting lands to Louisiana and other States, did not vest the fee in those States, consequently, in a suit to try the legal title, one claiming such land, under a patent from the United States, must prevail over one claiming under a patent from the State.

Under the act of August 3, 1846 (9 Stats. at Large, 51), the Commissioner of the General Land Office had power to decide, finally, on the claims of these parties; and his decision, and a patent issued thereon, were conclusive in a suit for the land.

The case is stated in the opinion of the court.

Lawrence for the plaintiff.

Benjamin contra.

M'LEAN, J., delivered the opinion of the court.

THIS is a writ of error to the Supreme Court of the State of Louisiana.

A petitory action by petition was commenced in the fifth district court of New Orleans, on the fifth of February, 1847, by the plaintiff in error, claiming a tract of land of which the defendant had possession. The plaintiff claims under two patents from the State of Louisiana, issued under the law of that State of the 25th of March, 1844, and alleges title in the State, under the act of Congress of 4th September, 1841.

On the day the action was commenced, the defendant filed his answer, claiming the same land under a purchase made by Robert Bell and Thomas Barrett, from the United States, the 16th of May, 1836, and by mesne conveyances transmitted to the defendant. He pleads a prescription of a peaceable possession of more than ten years—that large and valuable improvements have been made on the premises, &c.

On the trial in the district court of New Orleans, the plaintiff gave in evidence patents from the State of Louisiana, for eight hundred and fifty-five acres and nine hundredths of an acre, the land in controversy, by virtue of the act of Congress of the 4th of September, 1841. The certificates of entries of the land were also in evidence.

The defendant produced in evidence five patents from the United States, dated 1st of September, 1847, and a sale of the premises by Thomas Barret to Robert Bell, by authentic act, on 17th May, 1836, and a series of mesne conveyances, terminating in a sale and conveyance by the widow R. Bell to the defendant, on May 9, 1844.

A jury not being demanded under the Louisiana law, the court gave judgment that the plaintiff recover of the defendant lot No. 1, of section 3, township 11, range 13 east, containing two hundred and eleven acres. The plea of prescription was sustained as to the residue of the tract. From this judgment, the defendant appealed to the Supreme Court of the State.

The Supreme Court reversed the judgment of the district court, and entered judgment in favor of the defendant for the land in controversy.

The plaintiff, on the ground that he claimed title under an act of Congress, and relied on the construction of another act to nullify the title of defendant, and as the decision of the Supreme Court was against the right asserted by him, procured the allowance of a writ of error under the 25th section of the judiciary act. (1 Stats. at Large, 85.)

The 8th section of the act of 4th September, 1841, declares "that there shall be granted to each State specified in the first section of the act, of which Louisiana is one, five hundred thousand acres of land, for purposes of internal improvement," provided such State had not received land for that purpose.

And it is provided that "the selections in all of the said States shall be made within their limits, respectively, in such manner as the legislature shall direct, located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land, except such as is or may be reserved from sale," &c.; no locations to be made until the land shall be surveyed by the United States.

In 1844, the legislature of Louisiana passed an act establishing an office for the sale of the unlocated lands granted to the State, with a register and State treasurer as receiver.

The 7th section of the act makes it the duty of the register and treasurer to issue warrants for the lands donated by Congress, and not as yet located, provided they shall not be issued for less than eighty, nor more than six hundred and forty acres, which warrants shall be sold in the same manner as the lands located, pro-

vided they shall not be sold for less than $3 per acre; and it shall be the duty of the governor to issue patents for all the lands that have been sold, and for the lands located by warrants, when contemplated to be sold by that act, whenever he shall be satisfied that the same must have been properly located."

Under the act of Congress and the State law the plaintiff purchased, it is alleged, two warrants from the State officers, and on the 7th of January, 1848, entered them in the land office of the United States at New Orleans upon the lands in controversy; and it is contended that these locations, independently of the patent issued by the State, being made on public land not reserved from sale by any law of Congress or proclamation of the President, which had been surveyed, and were entered in parcels conformably to the act of Congress, gave the plaintiff a right to the lands in contoversy under the act of 1841, unless the defendant had at that time an equitable or legal title to them.

The act of 1841 authorized the State to enter the lands where surveys had been executed and the lands were open to entry under the acts of Congress. The State of Louisiana acted within its powers in issuing warrants and establishing land offices as a means of disposing of the lands; but it had not the power to convey the fee, as it had not been parted with by the general government. The words of the act of 1841 are, "that there shall be granted to each State," not that there is hereby granted. The words import that a grant shall be made in future. (*Lessieur et al.* v. *Price*, 12 Pet., 75.)

It could not have been the intention of the government to relinquish the exercise of power over the public lands that might be located by the State. The same system was to be observed in the entry of lands by the State as by individuals, except the payment of the money, and this was necessary to give effect to the act, and to prevent conflicting entries.

The defendant claims under five patents from the United States, dated the 1st of September, 1847, which was some months after this suit was commenced. These patents were issued under the act of 3d of August, 1846. That act provides: "That the Commissioner of the General Land Office be, and he is hereby, authorized and empowered to determine, upon principles of equity and justice as recognized in courts of equity, and in accordance with general equitable rules and regulations to be settled by the Secretary of the Treasury, the Attorney General, and commissioner

conjointly, consistently with such principles, all cases of suspended entries now existing in said land offices, and to adjudge in what cases patents shall issue upon the same." This power is limited to two years, and the exercise of it shall only operate to divest the title of the United States, but shall not prejudice conflicting claimants.

By the above act the commissioner was required to arrange his decisions in two classes, and the 4th section requires patents to be issued in cases in the first class.

On the 9th of July, 1847, the commissioner reported to the Secretary of the Treasury "ten entries by pre-emption made at the land office of New Orleans which were heretofore suspended at the General Land Office. He says they have been adjudicated by me, and placed in the first class, under the act of the 3d August, 1846. It is stated that the first seven of the ten cases reported are entries by floats, arrising from settlements within the Houmas claim, and would have been embraced with similar cases in abstract No. 13, but that the land, in whole or in part, has been selected by the State under the act of 4th of September, 1841, since the floats were decided to be illegal under the act of 1834." (4 Stats. at Large, 678.) This report is agreed to by the Acting Secretary of the Treasury and the Attorney General.

As this decision was made by a special tribunal, with full powers to examine and decide, and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law.

Under the pre-emption act of 1830 (4 Stats. at Large, 420), revived and continued for two years by the act of 1834, pre-emption rights were granted to settlers on the public lands not exceeding to each settler one hundred and sixty acres: and where two settlers are found on the same quarter-section, each being entitled to a pre-emption for one hundred and sixty acres, the quarter which they occupied was divided between them, and each received a certificate for eighty acres in addition, giving a pre-emption right elsewhere on the public lands, which certificates were called floats. A number of these certificates were purchased by Thomas Barrett and Robert Bell, and by virtue of which they located the land in dispute. The settlements on which these certificates were issued were made on the Houmas claim, and as doubts existed whether the land embraced by this claim would be properly called public lands under the pre-emption laws, the entries were suspended: and these were the entries included in the above report

of the Commissioner of the General Land Office, and sanctioned by the Secretary of the Treasury and the Attorney General.

The patents issued by the State to the plaintiff were dated the 20th of April, 1846; and it seems that, on the 9th of the preceding month, the Commissioner of the General Land Office wrote to the register and recorder of New Orleans: "As Congress has taken the subject of the floating pre-emption entries arising from pre-emption settlements within the limits of the Houmas private claim into consideration, and is about to confirm them in the hands of *bona fide* assignees, I deem it proper, in order to prevent future inconvenience, to direct that all the land embraced by such entries, except as to those where the purchase-money has been refunded and the claim abandoned, be hereby considered as excused from disposition in any way, either by State selection or otherwise. The State selections already made will be suspended to await the action of Congress."

"If the contemplated law confirms all entries in the hands of *bona fide* assignees, it will, in all probability, defeat all locations made by State selections. In the meantime it is necessary that all appropriations of the lands covered by such entries be suspended."

It is true that, on the 24th December, 1845, the commissioner wrote to the same land office, "that, after the cancellation of pre-emption claims, if the land is not otherwise interfered with or reserved, it is considered as public land, liable to be located by the State." And it seems that the tracts for which the plaintiff obtained patents, were designated in the letter of the commissioner as coming within the category.

This decision or opinion of the commissioner did not affect the rights of the defendant, as appears from subsequent proceedings of the same office. As soon as the defendant was apprised of the above letter, he filed a *caveat* in the State land office, and, on the 9th of March, 1846, the commissioner, in his letter, as stated above, suspended the plaintiff's entries. And on the 25th of June, 1847, the Secretary of the Treasury, on a representation made by the commissioner of the land office, "approved the locations made under the floating claims, held by the actual settlers, who had improved the land, in preference to State locations." And this decision was sustained in the proceedings under the act of the 3d of August, 1846, by the report of the commissioner, sanctioned by the Secretary of the Treasury, and the Attorney General, as above stated.

The Houmas claim, as filed before the commissioners on land titles, extended from the Mississippi river to the Amite, embracing a large extent of country. It was confirmed by the commissioners, and also by an act of Congress passed in 1814. (3 Stats. at Large, 121.) This confirmation, however, was construed to be limited, and not extending to the boundaries claimed. The survey authorized by the Treasury Department, extended only one and a half leagues back from the river: and the register and receiver were instructed to treat the residue of the claim as public lands. This induced a great many persons to settle on the claim up to the year 1836. In that year, by order of the land office, the register and receiver were directed to withhold from sale the lands within the claim.

This suspension was continued, and the patent certificates which had been issued to purchasers were declared to have been issued without authority. Afterwards, in 1844, this claim, to its whole extent, was recognized as valid by the Secretary of the Treasury, in consequence of which, entries made within the grant were canceled and the purchase money returned. This action of the land office has been referred to for the purpose of understanding the nature of the pre-emption rights acquired by settlers upon the Houmas claim, and the floats which were issued, as above explained, under the law. These floats were issued under the authority of the government, and, when presented by *bona fide* purchasers, could not be disregarded. This was the origin of the right set up by the defendant. It has been sanctioned by the land office, by the Secretary of the Treasury, and the Attorney General, under the act of 1846, and a patent has been granted. Under the claim of the defendant, possession of the land has been held many years, and the improvements on it have made it of great value.

The plaintiff's title originated by his obtaining a float, as it was called, from the State land office, at three dollars an acre, in virtue of which he located the land in controversy, on 7th January, 1846, with the register of the land office of the United States. The plaintiff, through John Laidlaw, made an application to have the land specified in the float or warrant, but the register of the State declined to specify any lands in the warrant. He refused for some time to issue a patent on the location, as he had misgivings as to whether it would be right for him to do so; but, eventually, he issued it on the order of the governor, to test the validity of the title.

As the patent from the State did not convey the legal title to the plaintiff, he must rely only on his entry, and that, in a petitory action, cannot stand against the patent of the defendant. But, if the case were before us on the equities of the parties, the result would be the same. The entries of the land claimed by the defendant were prior in time to those of the plaintiff, and of paramount equity. The entries of both claims were suspended by the order of the government: and the decision of the secretary, and especially the decision of the commissioner, the Secretary of the Treasury, and the Attorney General, under the act of 1846, was final, and related back to the original entries of the land. The circumstances under which the plaintiff located his warrants on a very valuable sugar plantation, of which the defendant had long been in possession, do not strongly recommend his equity. We affirm the judgment of the Supreme Court of Louisiana, with costs.

NOTE.—The land to which the State was entitled under this act, could not be selected in any manner other than that prescribed by the legislature of the State. (*Hastings* v. *Jackson*, 46 Cal., 234.)

When selections are made by the agent of the State, authorized to select, and in the manner prescribed by the legislature, of public land subject to selection, the general gift of quantity become a particular gift of the specified land selected, vesting in the State a perfect and absolute title to such lands. (*Bludworth* v. *Lake*, 33 Cal., 255.)

If the State issue a patent for land to which it has no title, an after-acquired title will enure to the benefit of the patentee, even though the title is acquired by the State under a different and subsequent act of Congress than that under which the State sold the land. (*Scudday* v. *Shaffer*, 10 La. Ann., 133.)

Patents issued by the State, purporting to convey land granted to the State, is *prima facie* evidence of title, without showing that the land patented was actually embraced in the grant. (*Grant* v. *Smith*, 26 Mich., 201.)

JOHN POLLARD ET AL., LESSEE, plaintiffs in error, *v.* JOHN HAGAN ET AL., defendants in error.

December Term, 1844.—3 Howard, 212; 15 Curtis, 391.

The State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters within the limits of the State not previously granted.

The effect of the ordinance of 1787 discussed.

The case is stated in the opinion of the court.

Coxe for the plaintiff.

Sergeant contra.

M'KINLEY, J., delivered the opinion of the court.

This case comes before this court upon a writ of error to the Supreme Court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants in the Circuit Court of Mobile County, in said State, and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an act of Congress passed the 2d day of July, 1836 (6 Stats. at Large, 680), confirming to them the premises in the patent mentioned, together with an act of Congress passed on the 26th of May, 1824. (4 Stats. at Large, 66.) The premises in question were admitted by the defendants to be comprehended within the patent, and there was likewise an admission by both parties that the land lay been Church street and North Boundary street, in the city of Mobile; and there the plaintiffs rested their case."

"The defendants, to maintain the issue on their part, introduced a witness to prove that the premises in question between the years 1819 and 1823 were covered by water of the Mobile river at common high tide," to which evidence the plaintiffs by their counsel objected, but the court overruled the objection, and permitted the evidence to go to the jury. "It was also in proof, on the part of the defendant, that at the date of the Spanish grant to Panton, Leslie & Co., under which they claim, the waters of the Mobile bay at high tide flowed over what is now Water street, and over about one-third of the lot west of Water street, conveyed by the Spanish grant to Panton, Leslie & Co., and that the waters continued to overflow Water street and the premises sued for during all the time up to 1822 or 1823; to all which admissions of evidence on the part of the defendants the plaintiffs excepted." "The court charged the jury that if they believed the premises sued for were below the usual high-water mark at the time Alabama was admitted into the Union, then the act of Congress and the patent in pursuance thereof could give the plaintiffs no title, whether the waters had receded by the labor of man only or by alluvion; to which the plaintiffs excepted. Whereupon a verdict and judgment were rendered in favor of the de-

fendants, and which judgment was afterwards affirmed by the Supreme Court of the State."

This question has been heretofore raised before this court in cases from the same State, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided: and we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union and the State governments over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous well-considered decisions of this court, to which we shall have occasion to refer in the course of this investigation.

The counsel for the plaintiffs insisted in argument that the United States derived title to that part of Alabama in which the land in controversy lies, from the king of Spain, and that they succeeded to all his rights, powers, and jurisdiction over the territory ceded, and therefore hold the land and soil under navigable waters according to the laws and usages of Spain, and by those laws and usages the rights of a subject to land derived from the crown could not extend beyond high-water mark or navigable waters without an express grant; and that all alluvion belonged to the crown, and might be granted by this king, together with all land between high water and the channel of such navigable waters: and by the compact between the United States and Alabama on her admission into the Union it was agreed that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the State, and that the same should remain at the sole disposal of the United States: and that all the navigable waters within the State should forever remain public highways, and free to the citizens of that State and the United States, without any tax, duty, or impost or toll therefor imposed by that State; that by these articles of the compact the land under the navigable waters and the public domain above high water were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts would be to yield up to Alabama and the other new States all the public lands within their limits.

We think a proper examination of this subject will show that

the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United State and the trust created by the treaty with the French republic of the 30th of April, 1803 (8 Stats. at Large, 200), ceding Louisiana.

All that part of Alabama, which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the State of Georgia to United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virgina to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory northwest of the river Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia, authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the State, by a proper deed to convey to the United States, for the benefit of said States, all the right, title, and claim, as well of soil as jurisdiction, "upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be republican States, and admitted members of the federal Union, having the same rights of sovereignty, freedom, and independence, as the other States." And the delegates conclude the deed thus: "Now know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of the power and authority committed to us by the act of the said general assembly of Virginia before recited, and in the name, and for and on behalf of the said commonwealth, do, by these presents, convey, transfer, assign, and make over unto the the United States in Congress assembled, for the benefit of said States, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits

of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, to and for the uses and purposes, and on the conditions of the said recited act."

And in the deed of cession by Georgia, it is expressly stipulated, "That the territory thus ceded shall form a State and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period, if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the Northwestern Territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The manner in which the new States were to be admitted into the Union, according to the ordinance of 1787, as expressed therein, is as follows:

"And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States in all respects whatever." Thus it appears that the stipulations, trusts, and conditions are substantially the same in both of these deeds of cession; and the acts of Congress, and of the State legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception however—the cession made by Virginia was before the adoption of the constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the puposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands.

When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent

domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories.

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. (Vat. Law of Nations § 244.) This definition shows that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the State of Georgia, was sanctioned by the constitution of the United States; by the 3d section of the fourth article of which it is declared, that "new States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress."

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the session, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

By the sixteenth clause of the 8th section of the first article of the constitution, power is given to Congress "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the

United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above-mentioned, the national and municipal powers of government, of every description, are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new State to exercise all the powers of government, which belong to, and may be exercised by the original States of the Union, must be admitted, and remained unquestioned, except so far as they are temporarily deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending such surrender and cession to aid in paying the public debt incurred by the war of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete throughout their respective borders, and they and the original States will be upon an equal footing in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States for that particular purpose. The provision of the constitution, above referred to, shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the constitution, but it is

inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new States, "that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people in the new States and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject matter of the enactment: and when so passed it becomes the supreme law of the land and operates by its own force on the subject-matter, in whatever State or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment without the express consent of the people of the new State where it may happen to be contains it own refutation, and requires no further examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and State government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters and the soils under them, within her limits. The principle argument relied on against this right is, that the United States acquired the land in controversy from the king of Spain. Although there was no direct reference to any particular treaty, we presume the treaty of the 22d of February, 1819, (8 Stats. at Large, 252,) signed at Washington, was the one relied on, and shall so con-

sider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the king of Spain; and as by the laws and usages of Spain the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title.

If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives: and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. (Vat. Law of Nations, b. 1, c. 19, §§ 210, 244, 245, and b. 2, c. 7, § 80.)

The United States have never claimed any part of the territory included in the States of Mississippi or Alabama, under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795 (8 Stats. at Large, 138), "the high contracting parties declare and agree, that the line between the United States and East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northermost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahouchee river," &c. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.

Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect,

she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers to take their property with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows that Spanish grants made after the treaty of peace, can have no intrinsic validity." (*Henderson* v. *Poindexter*, 12 Wheat., 535.)

Previous to the cession made by Georgia, the United States, by the act of Congress of the 7th of April, 1798 (1 Stats. at Large, 549), had established the Mississippi territory, including the territory west of the Chatahouchee river, to the Mississippi river, above the thirty-first degree of north latitude, and below the Yazous river, subject to the claim of Georgia to any portion of the territory. And the territory thus erected was subjected to the ordinance of the 13th of July, 1787, for its government, that part of it excepted which prohibited slavery. (1 Story's Laws, 494.) And by the act of the 1st of March, 1817 (3 Stats. at Large, 348), having first obtained consent of Georgia to make two States instead of one within the ceded territory, Congress authorized the inhabitants of the western part of the Mississippi territory, to form for themselves a constitution and State government, "to consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of Washington county; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along said degree of latitude to the Mississippi river; thence up the same to the beginning." (3 Story's Laws, 1620.)

And on the 3d of March, 1817, Congress passed an act (3 Stats. at Large, 371), declaring, "that all that part of the Mississippi territory, which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido river; then east to the western boundary line of the State of Georgia; thence along said

line to the southern boundary line of the State of Tennessee; thence west along said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of Washington county; thence due south to the Gulf of Mexico; thence eastwardly, including all the islands within six leagues of the shore, to the Perdido river; thence up the same to the beginning; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama."

And by the 2d section of the same act it is enacted: "That all offices which exist, and all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law. (3 Story's Laws, 1634, 1635.)

And by the 2d article of the compact contained in the ordinance of 1787, which was then in force in the Mississippi territory, among other things it was provided that "the inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury, and of judicial proceedings according to the course of the common law." And by the proviso to the 5th section of the act of the 2d of March, 1819 (3 Stats. at Large, 489), authorizing the people of the Alabama territory to form a constitution and State government, it is enacted: "That the constitution, when formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the States and the people of the territory northwest of the Ohio river, so far as the same has been extended to the said territory (of Alabama) by the articles of agreement between the United States and the State of Georgia.

By these successive acts on the part of the United States, the common law has been extended to all the territory within the limits of the State of Alabama, and therefore excluded all other law, Spanish or French.

It was after the date of the treaty of the 22d of February, 1819, between the United States and Spain, but before its ratification, the people of the Alabama territory were authorized to form a constitution, and the State was admitted into the Union, according to the boundaries established when the country was erected into a territorial government. But the United States have never admitted that they derived title from the Spanish government to any portion of the territory included within the limits of Alabama. Whatever claim Spain may have asserted to the territory,

above the 31st degree of north latitude, prior to the treaty of the 27th of October, 1795, was abandoned by that treaty, as has been already shown. We will now inquire whether she had any right to territory below the 31st degree of north latitude, after the treaty between France and the United States, signed at Paris on the 30th of April, 1803, by which Louisiana was ceded to the United States. The legislative and executive departments of the government have constantly asserted the right of the United States to this portion of the territory, under the 1st article of this treaty; and a series of measures intended to maintain the right, have been adopted. Mobile was taken possession of and erected into a collection district by act (2 Stats. at Large, 251) of the 24th of February, 1804, c. 13. (2 Story's, 914.) In the year 1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far as the Perdido, and hold it for the United States. In April, 1812, Congress passed an act to enlarge the limits of Louisiana. (2 Stats. at Large, 708.) This act includes part of the country claimed by Spain as West Florida. And in February, 1813 (3 Stats. at Large, 472), the President was authorized to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not then in the possession of the United States. And these measures having been followed by the erection of Mississippi territory into a State (3 Stats. at Large, 472), and the erection of Alabama into a territory, and afterwards into a State (3 Stats. at Large, 608), in the year 1819, and extending them both over this territory, could it be doubted that these measures were intended as an assertion of the title of the United States to this country?

In the case of *Foster and Elam* v. *Neilson* (2 Pet., 253), the right of the United States to this country underwent a very able and thorough investigation. And Chief Justice Marshall, in delivering the opinion of the court, said: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own courts, would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession,

and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied." The Chief Justice then discusses the validity of the grant made by the Spanish government after the ratification of the treaty between the United States and France, and it is finally rejected on the ground that the country belonged to the United States, and not to Spain, when the grant was made. The same doctrine was maintained by this court in the case of *Garcia* v. *Lee* (12 Pet., 511). These cases establish, beyond controversy, the right of the United States to the whole of this territory under the treaty with France.

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws and compact to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England, as it prevailed in the colonies before the revolution, but as modified by our own institutions. In the case of *Martin and others* v. *Waddell* (16 Pet., 410), the present Chief Justice, in delivering the opinion of the court, said: "When the revolution took place, the people of each State became themselves sovereign; and, in that character, hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution." Then, to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor imposed by the said State," would be void if inconsistent with the constitution of the United States. But is this provision repugnant to the constitution? By the 8th section of the 1st article of the constitution power is granted to Congress "to regulate com-

merce with foreign nations and among the several States." If in the exercise of this power Congress can impose the same restrictions upon the original States in relation to their navigable waters as are imposed by this article of the compact on the State of Alabama, then this article is a mere regulation of commerce among the several States, according to the constitution, and therefore as binding on the other States as Alabama.

In the case of *Gibbons* v. *Ogden* (9 Wheat., 196), after examining the preliminary questions respecting the regulation of commerce with foreign nations and among the States, as connected with the subject-matter there in controversy, Chief Justice Marshall said: "We are now arrived at the inquiry, What is this power? It is the power to regulate—that is, to prescribe—the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

As the provision of what is called the compact between the United States and the State of Alabama does not by the above reasoning exceed the power thereby conceded to Congress over the original States on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama.

This supposed compact is, therefore, nothing more than a regulation of commerce to that extent among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hand a weapon which might be

wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution; for, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters and the soils under them were not granted by the constitution to the United States, but were reserved to the States respectively. Secondly. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

The judgment of the Supreme Court of the State of Alabama is, therefore, *Affirmed.*

CATRON, J., dissented.

The statute of 1836 and the patent of the United States founded on it, by which the land in controversy was granted to William Pollard's heirs, have, on several occasions heretofore, received the sanction of this court as a valid title.

1. In the case of *Pollard's Heirs* v. *Kibbe* (14 Pet., 353), the Supreme Court of Alabama having pronounced an opposing claim under the act of 1824 superior to Pollard's, this court reversed the judgment and established the latter, after the most mature consideration.

2. In the case of *Pollard* v. *Files* (2 How., 591), the precise title was again brought before the court, and very maturely considered. It was then said (page 602): "This court held, when Pollard's title was before it formerly, that Congress had the power to grant the land to him by the act of 1836. On this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama refers (in its own opinion in the record) grew out of the construction given by a

majority of the court to the act of 1824, by which the vacant lands east of Water street were granted to the city of Mobile.

On this occasion the decision of the Supreme Court of Alabama was again reversed, and Pollard's heirs ordered to be put into possession, and they now maintain it under our two judgments. It is here for the third time.

In the meantime, between 1840 and 1844, a doctrine had sprung up in the courts of Alabama, (previously unheard of in any court of justice in this country, so far as I know), assuming that all lands temporarily flowed with tide water were part of the eminent domain and a sovereign right in the old States; and that the new ones when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of State sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new States coming in, with equal rights appertaining to the old ones, took the high lands as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a State. Louisiana was admitted in 1812 (2 Stats. at Large, 701); to her the same rules must apply that do to Alabama. All acquainted with the surface of the latter know that many of the most productive lands there, and now in successful cultivation, were in 1812, subject to overflow, and have since been reclaimed by levees.

It is impossible to deal with the question before us understandingly without reference to the physical geography of the delta of the Mississippi and the country around the Gulf of Mexico, where the most valuable lands have been made and are now forming by alluvion deposits of the floating soils brought down by the great rivers the earlier of which had become dry lands; but the most recent were flowed, when we acquired the country, and are in great part yet so; thus situated they have been purchased from the United States and reclaimed; a process that is now in daily exercise. An assumption that mud flats and swamps once flowed,

but long since reclaimed, had passed to the new States, on the theory of sovereign rights, did, at the first, strike my mind as a startling novelty; nor have I been enabled to relieve myself from the impression owing to the fact in some degree, it is admitted, that for thirty years neither Congress, nor any State legislature, has called in question the power of the United States to grant the flowed lands, more than others; the origin of title, and its continuance, as to either class, being deemed the same. A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should as I think be concluded by long acquiescence, and especially in courts of justice.

Again, the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident. In such a case, where there is doubt, and a conflict suggested, the political departments, State and federal, should settle the matter by legislation; by this means private owners could be provided for and confusion avoided; but no State complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States, or by their agents, in the execution of the great trust imposed on the latter to dispose of the public domain for the common benfit; on the contrary, we are called on by a mere trespasser in the midst of a city, to assert and maintain this sovereign right for his individual protection, in sanction of the trespass.

But as already stated, the United States may be an owner of property in a State, as well as another State, or a private corporation, or an individual may. That the proprietary interest is large, cannot alter the principle. I admit if the agents of the United States obstruct navigation, the State authorities may remove the obstructions and punish the offenders; so the States have done for many years without inconvenience or complaint.

Nor can material inconvenience result. If a front to a city, or land for another purpose is needed, Congress can be applied to for a grant, as was done by the corporation of Mobile, in 1824; if the State where the land lies was the owner, the same course would have to be pursued. The States and the United States are not in hostility; the people of the one are also the people of the other; justice and donation is alike due from each.

Connecticut was once a large proprietor in the Northwest Territory, (now Ohio.) She owned the shores of a great lake and the

banks of navigable rivers. Can it be assumed that the admission of Ohio defeated the title of Connecticut, and that she could not grant? The question will not bear discussion; and how can the case put be distinguished from the other one before us. Nay, how can either be distinguished from the rights of private owners of lands above water, or under the water? Yet in either instance, is the owner in fee deprived of his property, on this assumption of sovereign rights?

The front of the city of Mobile is claimed by the act of 1824, sanctioned by this court as a valid grant in the five cases of *Pollard* v. *Kibbe*, 14 Pet., 353; of *The City of Mobile* v. *Eslava*, 16 Pet., 234; of the same plaintiff v. *Hallet*, 16 Pet., 261; of the same plaintiff v. *Emanuel*, 1 How., 95, and of *Pollard* v. *Files*, 2 How., 591. Except the grant to Pollard, the act of 1824 confers the entire title (so far as is known to this court), of a most valuable portion, and a very large portion, of the second city on the Gulf of Mexico, in wealth and population.

This act is declared void in the present cause: and the previous decisions of this court are either directly, or in effect, overthrown, and the private owners stripped of all title. On this latter point my brethern and I fully agree. Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will of necessity have to adopt some system of giving title, if it is possible to do so, aside from private legislation: as the flowed lands are too extensive and valuable for the latter mode of grant in all instances.

The charge of the State court to the jury was, that the act of Congress of 1836, and the patent founded on it, and also, of course, the act of 1824, were void, if the lands granted by them were flowed at high tide when Alabama was admitted: and it was immaterial whether the mud flat had been filled up and the water excluded by the labor of man or by natural alluvion. And this charge is declared to have been proper by a majority of this court.

The decision founds itself on the right of navigation, and of police connected with navigation. As a practical truth, the mud flats and other alluvion lands in the delta of the river Mississippi, and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance.

This is well illustrated by the recent history of Mobile. When

the act of 1824 was passed, granting to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud flat, slightly covered with water at high tide, of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and of course by individual enterprise, as the vacant space, as was apparent, must become city property: and it is now formed into squares and streets, having wharves and warehouses. The squares are built up: and the fact that part of the city stands on land once subject to the flow of tide, will soon be a matter of history.

At New Orleans, and at most other places fronting rivers where the tide ebbs and flows, as well as on the ocean and great lakes, navigation is facilitated by similar means; without their employment few city fronts could be formed, at all accommodated to navigation and trade. To this end private ownership is indispensable and universal; and some one must make title. If the United States has no power to do so, who has? I repeat, can Alabama grant the soil? She disavowed all claim and title to and in it, as a condition on which Congress admitted her into the Union.

By the act of March 2, 1819 (3 Story's Laws, 1726), the Alabama territory was authorized to call a convention, and form a State constitution; but Congress imposed various restrictions, and among others the following one:

"And provided always, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States."

On the 2d of August, 1819, the convention of Alabama formed a constitution, and adopted an ordinance declaring "that this convention, for and on behalf of the people inhabiting this State, do ordain, agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States." In addition, all the propositions offered by the act of March 2, 1819, were generally accepted without reservation.

On the 14th of December, 1819, Congress, by resolution, admitted Alabama as a State, on conditions above set forth. (3 Story's Laws, U. S., 1804.)

That the lands in contest, and granted by the acts of 1824 and 1836, were of the description of "waste or unappropiated," and subject to the disposition of the United States, when the act of Congress of the 2d of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted.

And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a State to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the State, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles.

It follows, that if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine of a majority of my brethren mainly tends. The assumption is that flowed lands, including mud flats extending to navigable waters, appertain to such waters, and are clothed with a sovereign political right in the State; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of State sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of United States are declared void; conceding to the theory all the plentitude it can claim, still Alabama has only political jurisdiction over the thing; and it must be admitted that jurisdiction cannot be the subject of a private grant.

The present question was first brought directly before this court (as I then supposed, and now do), in the cause of *The City of Mobile* v. *Eslava*, in 1849, when my opinion was expressed on it at some length. It will be found in 16 Pet., 247, and was in answer to the opinion of the Supreme Court of Alabama, sent up as part of the record, having been filed pursuant to the statute of that State, found in Clay's Digest, 286, § 6. My opinion, then given, has been carefully examined, and so far as it goes, is deemed correct (except some errors of the press), nor will the reasons given be repeated.

In Hallett's case (16 Pet., 263), reasons were added to the former opinion. And again, in the case of Emanuel, the question is referred to in an opinion found in 1 How., 101.

In *Pollard's Lessee* v. *Files* (2 How., 602), the question whether Congress had power to grant the land now in controversy, was treated as settled. As the judgment was exclusively founded on the act of 1836 (the plaintiff having adduced no other title), it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to myself to say that it was the unanimous judgment of the members of the court then present.

I have expressed these views in addition to those formerly given, because this is deemed one of the most important controversies ever brought before this court on any title, either as it respects the amount of property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

NOTE.—The same doctrine held in *Goodlittle* v. *Kibbe*, 9 How., 471; and *Doe* v. *Beebe*, 13 How., 25; *New Orleans* v. *United States*, 10 Peters, 662. The same rights are claimed by the territories. *Henman* v. *Warner*, 6 Oregon, 408.

Upon a State being admitted into the Union, she becomes the owner of the soil under her navigable waters. *Freedman* v. *Goodwin*, 1 McAllister, 142; *Griffin* v. *Gibb*, 1 McAllister, 212.

The State is the owner of the soil to high water mark. *Guy* v. *Hermance*, 5 Cal., 73; *Ward* v. *Mulford*, 32 Cal., 365; *Farrish* v. *Coon*, 40 Cal., 33; *Taylor* v. *Underhill*, 40 Cal., 471.

Neither the State nor the United States has asserted any right or claim to the bed of the small lake within the State, and where the water continues so shallow as to render the land under it susceptible of beneficial private use, the riparian ownership extends to the centre line of the lake, unless there be an intervening island, which the government has shown an intention to reserve from the grant of the main land by surveying it, as a separate tract, in which case the riparian ownership would extend only to the center line between the island and the main land. *Rice* v. *Ruddeman*, 10 Mich., 125.

All islands situated in the Missouri river at the time the public lands were surveyed, continue to be the property of the government, with all accretions, until surveyed and sold; and the owners of an adjoining island would acquire no title to such island by mutual accretions bringing the two islands together. *Benson* v. *Morrow*, 61 Mo., 345.

BRADDOCK JONES, plaintiff in error, *v.* JAMES G. SOULARD.

December Term, 1860.—24 Howard, 41; 4 Miller, 8.

Riparian Ownership.—Boundaries on the Mississippi.

1. All grants of land bounded by fresh water rivers, where the expressions designating the water-line are general, confer proprietorship to the middle thread of the stream.
2. The owner of such a grant becomes entitled to accretions as they are formed.
3. This rule applies to the great navigable rivers, such as the Mississippi, as well as others.
4. The boundary line of the State of Missouri and of the city of St. Louis is the middle of the main channel of that river, and survey No. 404 of school lands of St. Louis, covering Duncan's Island, was rightfully made, though the island was made land since the grant of these lands for school purposes in 1812, and since the incorporation of St. Louis as a town.

THIS is a writ of error to the Circuit Court for District of Missouri. The facts are sufficiently stated in the opinion.

Mr. Goresche and *Mr. Blair* for plaintiff in error.

Mr. Garett for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

Soulard sued Jones to recover the northern part of a United States survey of land laid off for the St. Louis schools. The part sued for fronts the Mississippi, and includes a sand-bar, formerly covered with water when the channel of the river was filled to a navigable stage. The land is included in the survey approved June 15th, 1843, designating the school lands, and the controversy would be governed beyond dispute by the principles declared in the case of *Kissell* v. *St. Louis Public Schools* (18 How.), had this been fast land in 1812, when the grant to the schools was made. But it is insisted that the title to this accretion within the Mississippi river did not pass by the act of 1812, and remained in the United States till the State of Missouri became one of the States of the Union in 1820, when the title vested in the State as a sovereign right to land lying below ordinary high-water mark. And furthermore, that if the State did not take by force of her sovereign right, she acquired a good title to the land known as Duncan's Island by the act of Congress to reclaim swamp lands. These claims the State conveyed by a statute to the city of St.

Louis, and that corporation conveyed them to Jones, the plaintiff in error.

Soulard claims under the corporation of the St. Louis schools. The school survey No. 404 conveys 78.96 acres, including the land in controversy.

The town of St. Louis was incorporated in 1809 by the Common Pleas Court of St. Louis county in conformity to an act of the territorial legislature passed in 1808, and the only contested question in the cause is whether the eastern line of the coporation extends to the middle thread of the Mississippi river, or is limited to the bank of the channel. The calls for boundary in the charter are, "beginning at Antoine Roy's mill on the bank of the Mississippi; thence running sixty arpens west; thence south on said line of sixty arpens in the rear, until the same comes to the Barrieu Donoyer; thence due south until it comes to the Sugar Loaf; thence due east to the Mississippi; from thence by the Mississippi to the place first mentioned."

The expression used in designating boundary on the closing line in the charter is as apt to confer riparian rights on the proprietor of the tract of seventy-nine acres as the call could be, unless the last call had been for the middle of the river.

Many authorities resting on adjudged cases have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time, all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretion. We think this as a general rule too well settled as part of the American and English law of real property to be open to discussion; and the inquiry here is whether the rule applies to so great and public a water course as the Mississippi is at the city of St. Louis? The land grant to which the accretion attached has nothing peculiar in it to form an exemption from the rule; it is an irregular piece of land of seventy-nine acres, found vacant by the surveyor general, and surveyed by him as a school lot in conformity to the act of 1812.

The doctrine that on rivers where the tide ebbs and flows grants of land are bounded by ordinary high-water mark has no application in this case; nor does the size of the river alter the rule. To hold that it did would be a dangerous tampering with riparian rights,

involving litigation concerning the size of rivers as matter of fact, rather than proceeding upon established principles of law.

1. We are of the opinion that the city charter of St. Louis, of 1809, extends to the eastern boundary of the State of Missouri in the middle of the river Mississippi. (*Doraston* v. *Payne*, 2 Smith's Leading Cases, 225.)

2. That Duncan's entry set up in defense in the court below is void, as this court held in the case of *Kissell* v. *The St. Louis Schools*, (18 How.)

3. That the school corporation held the land in dispute, with power to sell and convey the same in fee to the defendant in error, Soulard, in execution of their trust.

It is ordered that the judgment of the circuit court be

Affirmed.

GEORGE C. BATES, plaintiff in error, *v.* THE ILLINOIS CENTRAL RAILROAD COMPANY.

December Term, 1861.—1 Black, 204; 4 Miller, 437.

Riparian Rights—Boundaries.

1. The survey and plat by which the United States sold the land under which plaintiff claims, showed the east boundary to be the lake, and the south boundary, the Chicago river. The plat represents the Chicago river as running about due east with the lake. In point of fact, when this survey was made, this was an artificial channel. The main channel diverged southwardly, and entered the lake at a different point, making a sand bar, which is the subject of the present contest. *Held*, that the grantee is bound by the survey and map as to the quantities specified in his patent, and acquired no claim to the sand bar in question.
2. The government of the United States has the right, through its officers, to determine the boundaries by which it sells or grants its lands, and a purchaser is bound by descriptive calls, surveys, and plats, designating what he buys.
3. It was properly left to the jury to say whether, at the date of the acts under which plaintiff claims, the land in controversy was within the boundaries by which he purchased.
4. This sand bar did not exist at the date of this suit, but had been washed away, and was land under water permanently, over which the defendant's railroad was carried; and the question of the plaintiff's loss by this washing away of the sand bar, though much discussed, had no application, since the jury decided that he never owned it.

WRIT OF ERROR to the Circuit Court for the Northern District of Illinois. The case is stated in the opinion.

Mr. Wells for plaintiff.

Mr. Joy and *Mr. Noyes* for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

This cause comes here by writ of error to the Circuit Court of the United States for the Northern District of Illinois. The railroad company is sued in ejectment by Kinzie's representatives, for land lying under water at the city of Chicago—the end of the road running into Lake Michigan. The controversy depends on the following charge of the court to the jury:

"By the act of Congress of July 1, 1836, entries of the character of Kinzie's were confirmed, and patents were to be issued therefor, as in other cases. A patent accordingly issued to Kinzie on the 9th of March, 1837. There can be no reasonable doubt, I think, that this title, thus perfected, related back to the entry of Kinzie, in May, 1831, and the law gave it effect from that date precisely as if it had been made in the proper land office.

"The land had been surveyed in 1821, and on the plat of the government survey, the north fraction of section 10 is represented as having the Chicago river on the south, and Lake Michigan on the east. The river is represented as flowing out in nearly a straight line into the lake. The fact seems to be that from 1816 to 1821, the river, instead of flowing out, as represented on the survey, just before it entered the lake, made a sharp curve to the south, and thereby formed a sand bar or spit of land between it and the lake, which has given rise to this controversy. This sand bar existed in 1821, but it is not noticed in the plat of the survey. In 1821, the river seems to have run into the lake, according to the plat, but it is said this was in consequence of an artificial channel cut through the sand bar. This channel was stopped up in the winter of 1821–2, but was opened again in the spring of 1822 by a freshet, and water continued to flow out there in the summer of 1822; but during 1821 and 1822, more or less water passed from what had been the mouth prior to 1821. After 1822, the direct channel was stopped up, and, with an occasional exception, caused by the act of man, or by a freshet, the river flowed into the lake up to 1833, in its original and natural bed. In 1833 and in 1834, the government constructed piers across the sand bar, and the river, from that time, has flowed through those piers,

the old channel south of the pier having ceased to bear the waters to the lake, because the south pier was run across it, as well as across the sand bar. In the construction of the piers, the government of the United States did not purchase or condemn the land, but Kinzie seems to have acquiesced in the act; and, indeed, as already stated, it was not till 1836 that Kinzie's title was confirmed."

An exception was taken to the concluding part of the charge, which is as follows:

"Under this state of facts, the substantial truths of which are not denied, the land of Kinzie, covered by his entry and purchase, would be the tract within the following boundaries as they existed at the time of the entry, (there being no question made, but that the government plats by which sales were made show that the whole land north of the river and south of the north line of the fraction was sold as one parcel), and are the north line and west line of fractional section 10, according to the public survey, and the Chicago river and Lake Michigan, as they existed—that is, it would include all the dry, firm land there was at that time between the west line of the section and the lake and the north line of the section and the river. The river, the lake, and the two lines of the fractional section 10 constituted the boundaries. Whether the land in controversy was within these boundaries is a fact to be found by the jury, depending upon the evidence before them."

The facts as recited were not disputed, nor is any exception taken to the statement made preceding the court's conclusion on the law and facts of the case.

The land trespassed on and sued for, as described in the plaintiff's declaration, lies south of the south pier, is now covered with water, and part of the bottom of the lake; on which land the end of the railroad is located. It was formerly overlaid with the sand-bar, which was swept away by the current the piers created. It is situated outside of fractional section 10, as its boundary was described by the judge to the jury. And this raises the question, by what rule is the public survey to which the patent refers for identity to be construed? The land granted is 102.29 acres, lying north of the Chicago river, bounded by it on the south and by the lake on the east. The mouth of the river being found, establishes the southeast corner of the tract. The plat of the survey and a call for the mouth of the river in the field-notes show that the

survey made in 1821 recognized the entrance of the river into the lake through the sand-bar in an almost direct line easterly, disregarding the channel west of the sand-bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821, nor whether this northern mouth was occasional or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets.

The public had the option to declare the true mouth of the river for the purposes of a survey and sale of the public land; and the court below properly left it to the jury to find whether land on which the railroad lies is within the boundary of the tract surveyed and granted. According to the judge's construction of the plat and calls and the patent founded on the survey the jury was bound to find for the defendant, and therefore this ruling was conclusive of the controversy.

In regard to the matter so much and so ably discussed in the argument here, as to the rights of proprietors on the lake shore where their fronts are swept away by currents, and to what extent they still owned the land covered with water, undoubtedly theirs before the decrease took place, we do not feel ourselves called on to decide, because this plaintiff was not the owner of the land sued for before the decrease occurred, and could have no proprietary rights in the bottom of the lake. Before a proprietor can set up his claim to accretions and the like he must first show that he owns the shore, and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless.

Judgment of the circuit court affirmed.

NOTE.—If at the time the land was sold by the government, there was between the meander line and the stream a body of swamp or waste land, or flats on which timber and grass grew, and horses and cattle could feed, and hay be cut, such land was not embraced in the land entered; but if when the land was entered, the bank of the river at an ordinary stage of water reached the meander line, and the land in controversy had since been formed by a receding of the water, or by accretions to the shore and bank, then it becomes the land of the adjoining owner under the entry. *Granger* v. *Swart*, 1 Woolworth, 88.

A meander line of the public surveys is *prima facie* a line following the windings of the stream, but it may be shown by parole that it did not

follow the stream; but followed a slough, and that there was public land between the meander line and the river at the time the survey was made. In such case the purchaser from the government acquires no title to the land between the meander line and the river, and the government may afterward survey such land and sell it as other public land is sold. *Lammers* v. *Nissen*, 4 Neb., 245.

The survey of a donation claim was run as near to a bar along the bank of a river as possible, and the river was considered the boundary at the time of the survey. *Held*, that all alluvion subsequently formed belong to the donation property. *Stephenson* v. *Gaff*, 10 Rob. (La.), 99.

A purchaser of an island from the government, acquires no title to the land between high and low water mark. *Haight* v. *City of Keokuk*, 4 Iowa, 199; *Tomlin* v. *D. B. and Miss. R. R. Co.*, 32 Iowa, 106.

RAILROAD COMPANY *v.* SCHURMEIR.

December Term, 1868.—7 Wallace, 272.

1. The meander lines run in surveying fractional portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but, for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser.
2. Congress in providing, as it does, in one or more acts relating to the survey and sale of public lands bordering upon rivers—that navigable rivers, within the territory to be surveyed, should be deemed to be public highways, and that where the opposite banks of any stream not navigable, should belong to different persons, the stream and the bed thereof, should become common to both; meant to enact that the common law rules of riparian ownership should apply in the latter case, but that the title to lands bordering on navigable streams should stop at the stream, and not come to the *medium filum*.
3. But such riparian proprietors have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as riparian proprietors on navigable waters, affected by the ebb and flow of the tide.
4. A government grant of land in Minnesota (9.28 acres), bounded on one side by the Mississippi, was *held* to include a parcel (2.78 acres), four feet lower than the main body, and which, at very low water was separated from it by a slough or channel twenty-eight feet wide, through which no water flowed, but in which water remained in pools; where, at medium water it flowed through the depression, making an island of the parcel, and where, at high water the parcel was submerged; the whole place having previous to the contro-

versy been laid out as a city, and the municipal authorities having graded and filled up the place to the river edge of the parcel.

5. If, by the laws in force in Minnesota, in 1859, the recording of a town or city plot, indicating a dedication for a public purpose, of certain parts of the land laid out, operated as a conveyance in fee, to the town or city, yet, it could operate only as a conveyance of the fee, subject to the purpose indicated by the dedication, and subject to that it must be held by any future claimant.

ERROR to the Supreme Court of Minnesota.

Schurmeir filed a bill in one of the inferior courts of Minnesota, to enjoin the St. Paul and Pacific Railroad Company from taking possession and building its railroad upon certain ground in the city of St. Paul, Minnesota, bordering on the Mississippi, and originally a fractional section of the public lands. The place was alleged by Schurmeir to be a public street and landing.

The railroad company justified their entry as owner in fee of the *locus in quo*. The issues between the parties were tried by a referee, who found both facts and law in favor of Schurmeir. The facts so found being undisputed, the case was removed, for decision on them, to the Supreme Court of the State. That court affirming the referee's judgment, the case was here for review.

The case—to understand which well, it is necessary to refer, in a preliminary way, to certain statutes of the United States governing the surveys and descriptions of public lands—was thus:

Certain statutes enact (act of May 18, 1796, 1 Statutes at Large, 446; May 10, 1800, 2 Statutes at Large, 73; and February 11th, 1805, 2 Statutes at Large, 313), that the public lands shall be subdivided into townships, sections, and quarter-sections, and that these subdivisions shall be bounded by north and south and east and west lines, unless where this is rendered impracticable *by meeting a navigable water course, &c.* The boundaries, and contents of the several sections and quarter-sections, are to be ascertained in conformity to the following principles:

"The boundary line actually run, and marked in the surveys returned, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof: and the boundary lines which shall not have been actually run and marked as aforesaid, shall be ascertained by running straight lines from the established corners

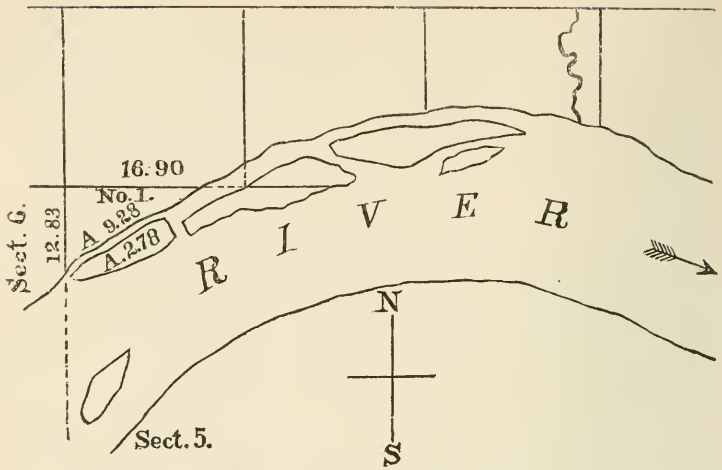
to the opposite corresponding corners; but, in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the said boundary lines shall be ascertained by running from the established corners, due north and south or east and west lines (as the case may be), *to the water course, * * * or other external boundary of such fractional* township."

There is apparently no law which requires what is hereafter spoken of, and called the "meandering" of water courses; but the acts of Congress above referred to do require the *contents* of each subdivision to be returned to, and a *plat of the land surveyed* to be made by the surveyor general; and this makes necessary an accurate survey of the meanderings of the water course, where a water course is the external boundary; the line showing the place of the water course, and its sinuosities, courses, and distances, is called the "meander line." (See the able opinion of Wilson, C. J., in 10 Minnesota, 99, 100, from which this account is extracted.)

The original act of 17th May, 1796, providing for the sale of these lands, enacts that all navigable rivers within the territory to be disposed of, shall be deemed to be and remain public highways; and in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both. (And see act of April 16, 1814, 3 Statutes at Large, 125, as explained by act of February 27, 1815, 3 Statutes at Large, 218.)

The premises on which the railroad company sought to enter, were situated upon a fractional section, duly surveyed by the government surveyor in October, 1847; the survey duly approved in March, 1848, and returned to the General Land Office.

This fractional section was designated by this survey as lot 1, in section 5, township 28 north, of range 22 west of the fourth principal meridian. It was represented by the plat thereof, as bounded on the north by the east and west sectional line, on the west bythe north and south sectional lines, and on the only remaining side by the Mississippi river. It was this river that interposed and made this section a fractional one.



At the time of the survey there was a parcel of land (called by the counsel on one side a sand-bar, reef, or "tow-head," and by the counsel on the other an island) lying along the shore of the river, about four feet lower than the main land of the fraction, and with a channel or slough between it and the main land. This depression was about 28 feet wide, and the bar or island, in its extreme width, was about 90 feet. Its extreme length was about 160 feet. The main body contained 9.28 acres; this parcel, 2.78 acres.

In high water this parcel of land outside was completely under water; in medium water it was exposed to view, and the water flowed through the depression: but at very low water there was no *flow* of water through the depression. It lay in pools in the depression. Very low water-mark was thus the exterior part of the bar or island, and the landing place for boats plying on the Mississippi had always been the south or river side of the island.

In the government survey no mention of or reference to this bar or island was in any way made in the field notes, plat, or map. The fractional parcel, as already said, was represented as lying immediately upon and bounded by the Mississippi river.

The surveyor, however, in meandering the course of the river along the fraction ran the "meander lines" along the main land of the shore, and not along the southerly line of this bar or island,

and thus did not include the space occupied by this depression, and bar or island, in his estimate of the quantity of land contained in the fraction.

The field notes showed that the line running 12.83 south, from corner sections 5 and 6, intersected the *bank* of the Mississippi river, and that a meander post was there set; also, that at a point 16.90 east of said section corner, the township line intersected the left *bank* of the Mississippi river, and that a meander post was there also set.

The meander line was run, beginning at last-mentioned meander post; *thence up stream*, south 61, west 6.50; south 54, west 6.00; south 46, west 5.00; south 40, west 3.96, to line of sections 5 and 6, at lower end of St. Paul."

In March, 1849, the United States sold and conveyed the land to one Roberts; the patent describing the lot (along with another fractional section, styled No. 2, not connected with this case) as containing so many acres, "according to the official *plat* of the survey:" a plat which, as already said, did not present the bar or island in any way, nor the channel or slough between, but presented the river as the boundary.

In the same spring Roberts surveyed, laid out, and platted the whole of this fractional parcel (including the bar or island and intervening depression in his plat, and as a part of the grant of his patent) into towns, blocks, lots, streets, &c., constituting a part of the town of St. Paul, and caused said plat to be duly recorded; an act which by the laws of Wisconsin (at that time in force in Minnesota) operated to vest the fee simple of every donation or grant to the public, or any corporation or body politic in it for the uses therein named, and no other; and which declared that "land *intended* to be for *streets*, alleys, *ways*, commons, or *other public use*, * * * or for any addition thereto, shall be held in the corporate name in trust to and for the uses and purposes set forth and expressed or intended." Roberts subsequently sold to Schurmeir two lots, designated on the plan as lots Nos. 11 and 12, in block 29. All the space in front of this block and between this block and river was designated as "*Landing*," and soon as St. Paul was organized into a city it exercised municipal control over the space, established a grade, and caused the place to be more or less graded, maintaining it was a landing. Schurmeir's two lots the whole of and the so-called "landing" were situated upon what had been the slough or channel.

In 1856, and after this depression had been filled, and the whole space between the lots and the river, including the depression and the bar or island had been graded by the city, and traces of both had been effaced, the space originally occupied by this bar or island was surveyed by a government surveyor, and platted and mapped as "Island No. 11," in said section 5.

By virtue of this survey the railroad company claimed the title under a congressional land grant of May 22, 1857.

The important question in the case was therefore this: By what exact line was the grant bounded on the river side? Was it—

1. By either the *medium filum* of the Mississippi or the outside of the sand bar or island? Or was it—

2. By the meander lines run by the surveyor?

If by either of the former, the railroad company had no right.

If by the latter, Schurmeir had none.

A minor question was whether—supposing Roberts to have owned the parcel originally—he had or had not, under the statutes then in force in Minnesota, divested himself of such right by recording his town plot?

Mr. T. A. Hendricks for the railroad company, plaintiff in error.

The land system of the United States was designed to provide, in advance, with mathematical precision, the ascertainment of boundaries. The purchaser takes by metes and bounds. These rules are settled, and accordingly the township line at the north, the section line at the west, and the meander line on the remaining side—a line beginning and ending at posts, and running by courses, described between them—must constitute the boundary here. In no other way can the rules be conformed to. By the pretensions of the opposite counsel, the purchaser would pay for a little more than nine acres, and get but little less than twelve. The lines marked on the ground must thus control. (*Bates* v. *Railroad Company*, 1 Black, 204; *Walker* v. *Smith*, 2 Pennsylvania State, 43; *Younkin* v. *Cowan*, 34 Pennsylvania State, 198; *Hall* v. *Tanner*, 4 Pennsylvania State, 244.)

But, admit that the land comes to the bank edge. This is the most the other side can pretend, for the pretension of carrying the grant to the middle line of a vast river, is untenable in our country even at common law. (*Carson* v. *Blazer*, 2 Binney, 475; *Bullock* v. *Wilson*, 2 Porter, (Alabama), 436: *People* v. *Canal Appraisers*, 33 New York, 461; *McManus* v. *Carmichael*, 3 Clark, (Iowa), 1),

and plainly in the face of the statute of May 17, 1796, and other statutes. What, then, is the bank of a river? It is decided in Pennsylvania, (*McCollough* v. *Wainright*, 2 Harris, 171; and see *Storer* v. *Freeman*, 6 Massachusetts, 435; and *Lewen* v. *Smith*, 7 Porter, (Alabama), 428), to be "the continuous margin, where vegetation ceases."

The *shore* is, on the other hand, decided to be "the pebbly, sandy, or rocky space between that and low water mark." This island, when it was an island, and not the bottom of the river, was four feet below the bank. When in the condition most favorable to the case of the other side, it was "sandy space," between *very* low water-mark and the bank; not bank, but shore.

In fact, however, it was not rightly considered even shore.

In one condition of the river, it was river bottom: in another, the ordinary condition, an island in the river; and only in a third, and rare condition, "very low water," did it approach even the character of shore.

We may add, that Roberts, by his dedication of the land for a landing, parted with his property, and that his grantee, Schurmeir, has no title in it, an cannot now restrain the railroad from entering on it.

Mr. Allis contra.

1. The meander lines are not boundaries. They are not even known to the laws or acts of Congress. The term "meander" is simply used to designate certain lines, run by the surveyors, along the windings of water-courses, bounding fractions, for the purpose of ascertaining and returning the quantity of land in such fractions.

There is no provision in the acts of Congress for meandering a water-course, or running any line along its bank. But the *quantity* of land in a fraction must be returned; hence, alone, the surveyor runs lines along the bank.

2. If the surveyor make an error in his return, as to the quantity of the land, or if the quantity is erroneously stated in the patent, this will not affect the grant. The grantee will take according to the boundaries of the land described. (*Lindsey* v. *Hawes*, 2 black, 554.)

3. Whether the grant extends to the *medium filum* of the river, is a point not in the least necessary to be considered—though we believe it does. Most of the authorities which would deny this proposition, concede that the riparian owner takes to *low water*

mark. (*Doraston* v. *Payne*, 2 Smith's Leading Cases, 224–6.) That is all that we need maintain.

4. The record of the town plot did not make a *dedication* of land intended for "streets, alleys, ways, commons, or other public uses," equivalent to a grant in fee, whatever it might do by a "donation or grant" marked on the plat. Even if the plot did so make it, the town was bound to hold it for the purpose specified—in this case a "landing"—and Schurmeir, if interested as a citizen, might file his bill.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Complainant alleged that he was the owner in fee, and in the actual possession of the real estate described in the bill of complaint, together with the stone warehouse thereon erected. As described, the premises are situated in the city of St. Paul, county of Ramsey, and State of Minnesota, and the allegation is, that the lot extends to and adjoins the public street and levee which run along the left bank of the Mississippi river, in front of that city; that the said street and levee constitute the public landing for all steamboats and other vessels bound to that port, and the place where all such vessels receive and discharge their freight and passengers; that the street, levee and public landing occupy the whole space between this lot and the bank of the river, in front of the same, and that he is the owner in fee of that whole space, subject to the public right to use and occupy the same as such street, levee and public landing.

Based upon these preliminary allegations, the charge is, that the corporation respondents were then engaged, without his license or consent, in extending and constructing their railroad over and along the said public streets, levee, and landing, in front of his premises, with the design and purpose of running their cars on the same for the transportation of freight and passengers; and the complainant alleged that the effect would be, if the design and purpose of the respondents should be carried out, that the said public street, levee and landing could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless.

Two defences were set up by the respondents in their answer:

First. They denied that the fee of the land described in the bill of complaint as a public street and levee, or public landing,

was ever in the complaint, or that he ever had any right, title or interest in the land between his premises and the main channel of the river.

Secondly. They alleged that all the land between the premises of the complainant and the river in front, were part and parcel of the lands surveyed by the United States, and granted by the act of Congress of the 3d of March, 1857, to the Territory of Minnesota, and that they were the owners of the same in fee, as the grantees of the territory and State, to aid in the construction of their railroad.

Defence of the other respondents is, that all the acts charged against them were performed by the direction and under the authority of the respondent corporation.

Prayer of the bill of complaint was that the respondent might be restrained from extending and constructing their railroad over and along said public street, levee, or landing, and from obstructing and impeding the free use of the same by the public.

By consent of parties it was subsequently ordered by the court that the cause be referred to a sole referee to hear and determine all the issues in the pleadings, and that he should report his determination to the court. Such a report was subsequently made by the referee, and the record shows that the court in pursuance of the same enjoined the respondents as prayed in the bill of complaint, and ordered, adjudged, and decreed that the respondents should remove from the street, levee, and landing in front of the complainant's premises all tracks, trestleworks, embankments, buildings, and obstructions of every kind erected or constructed thereon by them for railroad purposes.

Appeal was taken by the respondents from the decree as rendered in the district court for that county to the Supreme Court of the State, where the decree was in all things affirmed, and the respondents removed the cause into this court by a writ of error sued out under the twenty-fifth section of the Judiciary Act.

1. Express finding of the referee was that the premises in question were included in that part of section five, township twenty-eight north, in range twenty-two west, of the fourth principal meridian, which is situated on the north side of the center line of the Mississippi river. He also found that the survey of that part of section five was made by the deputy surveyor October 27, 1847; that the field-notes of the survey were duly communicated to the surveyor general, and that the latter officer, on the 15th of

March following, duly approved the survey as made by the deputy surveyor. Same report also shows that a plat of that part of section five was duly prepared and certified by the surveyor general on the same day, and that it was duly transmitted to the land office of the district where the land was situated.

By that plat it appears that the land as surveyed consisted of two separate parcels, called lots 1 and 2, in the report of the referee, exhibited in the record. Lot 1, the tract in question, is situated in the northwest corner of the section, and contains the quantity of land described in the official survey and plat. Particular description of lot 2 is unnecessary, as it is not in controversy in this case. Both of those lots were purchased by Lewis Roberts, and on the 24th of March, 1849, a patent in due form of law was issued to him for the same by the proper officers of the United States. Possessed of a full title to all the land described in the patent, the purchaser caused lot 1 to be surveyed and laid out into town blocks, lots, streets, &c., as a part of the town of St. Paul; and the finding of the referee is, that the plat, as recorded, describes the land as extending to the main channel of the river. Block 29, as exhibited on that plat, includes lots 11 and 12, described in the bill of complaint, and the report of the referee shows that they are a part of the triangular fraction of land situated in the northwest corner of section 5, as delineated on the official plat.

Claim of complainant is to lots 11 and 12, in block 29, and the finding of the referee is, that he holds the same through certain mesne conveyances from the original grantee under the patent.

Congress granted to the Territory of Minnesota by the act of the 3d of March, 1857, for the purpose of aiding in the construction of certain railroads, every alternate section designated by odd numbers for six sections in width on each side of the respective railroads therein mentioned and their branches, and the respondents claim title to the premises described in the pleadings under that act of Congress as the grantees of the State. (11 Stat. at Large, 195; State Session Laws, 1857, 70; Gen. Laws, 1858, 9; Session Laws, 1862, 226.)

Title claimed by the complainant, being of prior date to that set up by the respondents, will be first examined, because, if it be sustained as including the premises in controversy, an examination of the title of the respondents will not be necessary.

Since the town of St. Paul was organized under her city charter,

passed March 4, 1854, the city government has exercised municipal authority and control over the entire parcel of land lying between the main channel of the river and block twenty-nine, where the complainant's warehouse is situated. Claiming entire control over the premises as a street, levee, or landing, the city authorities have established a grade for the same, and, long before any attempt was made by the respondents to controvert the title of the complainant, they had made large progress in the work of reducing the surface of the land to the established grade.

Appellants contend that the river is not a boundary in the official survey: that the tract, as surveyed, did not extend to the river, but that the survey stopped at the meander posts and the described trees on the bank of the river.

Accordingly, they insist that lot 1 did not extend to the river, but only to the points where the township and section lines intersect the left bank of the river, as shown by the meander posts.

The finding of the referee also shows that the meander line of lot 1 was run in the official survey along the left or north bank of a channel which then existed between that bank and a certain parcel of land in front of the same, afterwards designated as Island 11, but which was not mentioned in the field notes of the official survey, nor delineated on the official plat.

Conceded facts is, that those field notes constituted the foundation of the official plat, and that that plat was the only one in the local land office at the time the patent was issued under which the appellee claims. When the water in the river was at a medium height, there was a current in the channel, between what is called the island and the bank, where the meander posts were located, but when the water was low, there was no current in that channel, and, when the water was very high in the river, the entire parcel of land designated as the island was completely inundated.

No mention is made of any such channel in the official survey under which the patent was issued; but the deputy surveyor, under the instructions of the land office, on the 13th of March, 1856, made a new survey of the parcel of land lying between that channel and the main channel of the river, and the field notes of the same were subsequently approved by the surveyor general. Duplicates of that survey were communicated to the General Land Office, and the finding of the referee shows that the plat exhibits the true relation which that tract bears to lot 1 in that section.

Prior to that survey, however, the city of St. Paul had filled the channel, and reclaimed the land at the west end of the same, and extended the grade of the street and levee or landing entirely across the island to the main channel of the river. Besides, the uncontradicted fact is that the landing for boats and vessels, touching at that port, was always on the river side of the island, and the finding of the referee shows that the front wall of the complainant's warehouse is not more than four feet north of the southerly line of the lot on which it is erected.

Surveyors were directed by the act of Congress of the 20th of May, 1785, to divide the territory, ceded by individual States, into townships of six miles square, by lines running due north and south, and others crossing these at right angles, * * * * "unless where the boundaries of the tracts purchased from the Indians rendered the same impracticable." (1 Land Laws, 19.)

Congress preserved the same system also in the act of the 18th of May, 1796, in respect of the survey and sale of the lands northwest of the Ohio river, but the latter act recognizes two other necessary exceptions to the general rule. (1 Stats. at Large, 464.)

Public lands therein described were required to be divided by north and south lines running according to the true meridian, and others crossing them by right angles, so as to form townships of six miles square, "unless where the line of the late Indian purchase, or of the tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable.

By the ninth section of that act it is provided that all navigable rivers within the territory mentioned in that act, should be deemed to be and remain public highways, and that, in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof should become common to both. (1 Stat. at Large, 468.)

Provision was made by the act of February 11, 1805, that townships should be subdivided into sections, by running straight lines from the mile corners, marked as therein required, to the opposite corresponding corners, and by marking on each of the said lines intermediate corners, as nearly as possible equidistant from the corners of the sections on the same.

Corners thus marked in the surveys are to be regarded as the proper corners of sections, and the provision is that the corners of half and quarter-sections, not actually run and marked on the

surveys, shall be placed, as nearly as possible, equidistant from the two corners standing on the same line. (2 Stat. at Large, 313.)

Boundary lines actually run and marked on the surveys returned, are made the proper boundary lines of the sections or subdivisions for which they were intended. And the second article of the second section provides that the length of such lines, as returned, shall be held and considered as the true length thereof. Lines intended as boundaries, but which were not actually run and marked, must be ascertained by running straight lines from the established corners to the opposite corresponding corners; but where no such opposite corresponding corners have been or can be fixed, the boundary lines are required to be ascertained by running from the established corners due north and south, or east and west, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township.

Express decision of the Supreme Court of the State was, that the river is, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the State court we entirely concur. (*Schurmeir* v. *The Railroad*, 10 Minnesota, 82.)

Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line, as actually run on the land, is the boundary.

Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways.

Grants of land bounded on rivers above tide water, says Chancellor Kent, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and

rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway. (3 Commentaries, 11th ed., 427.)

The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the centre of it, and he consequently holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. Substantially, the same rules are adopted by Congress as applied to streams not navigable; but many acts of Congress have provided that all navigable rivers or streams in the territory of the United States, offered for sale, should be deemed to be and remain public highways. (1 Stat. at Large, 491; 2 Stat. at Large, 235, 279, 642, 666, 703, 747; 3 Stat. at Large, 349.) Irrespective of the acts of Congress, it should be remarked that navigable waters, not effected by the ebb and flow of the tide, such as the great lakes, and the Mississippi river, were unknown to courts and jurists when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court that the admiralty had no jurisdiction except where the tide ebbed and flowed. (*The Jefferson*, 10 Wheaton, 428: *Genesee Chief*, 12 Howard, 456; *Hine* v. *Trevor*, 4 Wallace, 565.)

Extended discussion of that topic, however, is unnecessary, as the court decides to place the decision in this case upon the several acts of Congress, making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys.

Such a reservation, in the acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, or in the official

plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were effected by the ebb and flow of the tide; but it is quite clear that Congress did not employ the words navigable, and not navigable, in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide waters, and in which there were no salt water streams.

Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways.

Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tides. (*Dutton* v. *Strong*, 1 Black, 23.)

Argument is scarcely necessary to show, in view of the definite regulations of Congress upon the subject of the survey and sale of the public lands, that the second survey of the space between block twenty-nine and the main channel of the river, cannot affect the title of the complainant as acquired from the United States under the antecedent official survey and sale. (*Lindsey* v. *Hawes*, 2 Black, 554; *Bates* v. *Railroad Company*, 1 Black, 204; *Brown* v. *Clements*, 3 Howard, 650.)

Attempt is also made to justify the acts of the respondents, as grantees of the State, upon the ground, that the complainant, in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title vested in fee in the State. Respondents rely for that purpose upon the statute of the Territory of Wisconsin, which was then in force in the Territory of Minnesota. (Statutes of Wisconsin Territory, 159.)

Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defence to the suit, because it is nevertheless true, that the muncipal corporation took the title in

trust, impliedly, if not expressly designated by the acts of the party in making the dedication. They could not, nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant.

Considered in any point of view, our conclusion is, that the decree of the State court was correct; and the decision in this case also disposes of the appeal brought here by the same appellants, from a decree rendered by the Circuit Court of the United States for the District of Minnesota, in favor of George D. Humphreys and others, which was a bill in equity against the same respondent corporation. The appeal in that case depends substantially upon the same facts, and must be disposed of in the same way. Both decrees are— *Affirmed.*

NOTE.—The same doctrine applied to a navigable lake, *Forsyth* v. *Small*, 7 Bissell, 201; also see, *St. Clair Co.* v. *Lovingston*, 23 Wall., 46; and, *Boorman* v. *Sunnuchs*, 42 Wis., 233.

The meander line in the public survey along the banks of a river, is not the boundary of the lot; it is merely to determine the quantity of land contained in it, the lot extends to the center of the stream unless restrained by the terms of the grant. *Jones* v. *Pettibone*, 2 Wis., 308; *Walker* v. *Shepardson*, 4 Wis., 486; *Gavit* v. *Champers*, 3 Ohio, 496; *Benner* v. *Platter*, 6 Ohio, 505; *Canal Trustees* v. *Havens*, 11 Ill., 554; *City of Chicago* v. *Laflin*, 49 Ill., 172; *Braxen* v. *Bressler*, 64 Ill., 488; *Krant* v. *Crawford*, 18 Iowa, 549; *Ryan* v. *Brown*, 18 Mich., 196; *Morgan* v. *Reading*, 3 Smedes and M. (Miss.), 366; *Steamboat Magnolia* v. *Marshall*, 39 Miss., 109.

The purchaser takes to the water's edge. *Wright* v. *Day*, 33 Wis., 260.

The riparian owners on non-navigable lakes, own to the center thread of the lake. *Ridgway* v. *Ludlow*, 58 Ind., 248.

HENRY BRUSH, appellant, *v.* JOHN H. WARE AND OTHERS, appellees.

January Term, 1841.—15 Peters, 93; 14 Curtis, 34.

Where a patent is founded on an assignment of a certificate of a military right, a court of equity may inquire into an alleged fraud in that assignment, and if found fraudulent, decree the holder of the legal title to be a trustee for the equitable owner.

The act of the register in issuing a warrant under such a certificate, is ministerial, not judicial.

An executor has no power to assign a military right, unless given to him by the will, and a purchaser of such a title has constructive notice of the will, which he was bound to see.

The case is stated in the opinion of the court.

Mason for the appellant.

No counsel *contra*.

M'LEAN, J., delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of Ohio.

In their bill the complainants represent that they are the only heirs and legal representatives of John Hockaday, late of the county of New Kent, in the Commonwealth of Virginia.

That Hockaday, in the Revolution, was a captain in the Virginia line on continental establishment, which, under the acts and resolutions of Congress, entitled him to four thousand acres of land in the Virginia reservation, within the State of Ohio. That in 1799, Hockaday died, leaving as his only child and heir, Hannah C. Ware, who had intermarried with Robert S. Ware, and who was the mother of a part of the complainants and the grandmother of the others.

That Hockaday left a will in which he disposed of his personal estate only, and appointed Ware, with two other persons, his executors. Ware proved the will, the others declining to act; and that he wholly neglected his duties as executor and never settled the estate. That their mother died in 1805, and Robert S. Ware, their father, also died some years afterwards. That in the year 1808, one Joseph Ladd, who has since deceased, being insolvent and without heirs, fraudulently made a contract with the executor for the sale of the above military right: and having obtained the certificate of such right from the executive council of Virginia, the same was assigned to Ladd for the consideration of $40 and a pair of boots. That on this certificate and assignment Ladd obtained four warrants, of a thousand acres each, as the assignee of Ware, the executor of Hockaday.

One of these warrants was assigned to George Hoffman by Ladd, and through certain other assignments to Brush. By a part of this warrant the two tracts of land in controversy were entered, and for which Brush obtained patents from the United States, dated the 23d of January, 1818. And the complainants allege that Brush was a purchaser with notice of their equity, and they pray that he may be decreed to convey to them the title, &c.

In his answer the defendant states that he was a *bona fide* purchaser for a valuable consideration, and without notice of the complainants' equity. And he insists, if the court shall decree for the complainants, that he is entitled to the part usually given to the locator for making the entry and obtaining the title for the land. And also that he is entitled to moneys paid for taxes, &c., on the land.

This cause has been ably argued on the part of Brush, the appellant.

The question which lies at the foundation of this controversy, and which, in its order, should be first considered, is whether the court can go behind the patent and examine the equity asserted in the bill.

Whatever doubt might arise on this question on common law principles, there can be none when the peculiar system under which this title originated is considered. In Ohio and Kentucky this question has been long settled judicially; and this court, following the decisions of those States, have also decided it. (*Bodley and others* v. *Taylor*, 5 Cranch, 191.)

In the case of *Polk's Lessee* v. *Wendall et al.*, 9 Cranch, 98, the court say: "That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined." And the court after showing that a court of equity was the proper tribunal to make this examination, remark: "But there are cases in which a grant is absolutely void, as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

The same case was again brought before the court by a writ of error, and is reported in 5 Wheat. 293, in which the court held that the system under which land titles originated in Tennessee

being peculiar, constituted, with the adjudication of its courts, a rule of decision for this court.

In the case of *Miller and others* v. *Kerr and others*, 7 Wheat. 1, it was held that an equity arising from an entry of land made on a warrant which had been issued by mistake could not be sustained against a patent issued on a junior entry. The court say: "The great difficulty in this case consists in the admission of any testimony whatever which calls into question the validity of a warrant issued by the officer to whom that duty is assigned by law. In examining this question the distinction between an act which is judicial and one which is merely ministerial must be regarded. The register of the land office is not at liberty to examine testimony and to exercise his own judgment respecting the right of an applicant for a military land warrant.

And in the case of *Hoofnagle and others* v. *Anderson*, 7 Wheat,, 212, another question was raised on an entry made by virtue of the same warrant.

The mistake in the warrant consisted in this: Thomas Powell having performed military services in the Virginia State line, a certificate by the executive council of Virginia was obtained by his heir, which entitled him to a certain amount of land. On this certificate the register of the land office at Richmond, Virginia, issued a warrant, which, instead of reciting that the services were performed in the State line, stated that they were performed in the State line on continental establishment. This mistake was important, as the tract of country in Ohio in which the warrant was located was reserved, in the cession by Virginia, for the satisfaction only of warrants issued for military services in the State line on continental establishment, and consequently was not subject to the right of Powell. And the court remark, how far the patent ought to be affected by this error is the question on which the cause depends. They say there was no ground to suspect fraud; that the warrant was assignable, and carried with it no evidence of the mistake which had been committed in the office; that it had been assigned for a valuable consideration, and the purchaser had obtained a patent for the land without actual notice of any defect in the origin of his title; and they held that the patent gave a good title as against any one whose ntry was subsequent to its date.

A patent appropriates the land called for, and is conclusive against rights subsequently acquired; but where an equitable

right which orignated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined. The patent, under the Virginia land law, as modified by usage and judicial construction in Kentucky and Ohio, conveys the legal title, but leaves all equities open. (*Bouldin and Wife* v. *Massie's Heirs and Others*, 7 Wheat., 149.)

The controversy in this case does not arise from adverse entries, but between claimants under the same warrant: and it is admitted that Ware, as executor, had no power to assign the military right which, on the decease of Hockaday, descended to his heirs. It is too clear to admit of doubt that Ladd, by circumvention and fraud, obtained the assignment from the executor, which enabled him to procure the warrant from the register.

As between Ladd and the complainants, can there be any doubt that this case would be examinable in equity? Could the issuing of the warrant by the register interpose any objection to such an investigation?

It is insisted that the register, of necessity, before he issues the warrant, must determine the right of the applicant, and that in doing so he acts judicially; that presumptions not only arise in favor of such acts, but unless fraud be shown, they are not open to examination.

The executive council of Virginia in determining the right of Hockaday's heirs may be said to have acted judicially; but the register, in the language of the court in one of the cases above cited, acted ministerially. The court say he was not authorized to examine witnesses in the case, but was bound to act upon the face of the certificate. The parties interested were not before him, and he had no means of ascertaining their names, giving them notice, or taking evidence. And, under such circumstances, would it not be a most extraordinary rule which should gave a judicial character and effect to his proceedings? He acts, and must necessarily act from the face of the paper, both as it regards the certificate of the executive council and the asssignment of such certificate. His acts, in their nature, are strictly ministerial. They have neither the form nor effect of a judicial proceeding.

It may be admitted that presumptions arise in favor of the acts of a ministerial officer, if apparently fair and legal, until they shall be impeached by evidence; but in this case there is no impeachment of the acts of the register. The evidence on which he acted is stated on the face of the warrant, which enables the

proper tribunal, as between the parties interested, to determine the question of right, which the register had neither the means nor the power to do.

The complainants do not deny the genuineness of the certificate, the assignment, or the warrant, but they say that the executor had no right to make the assignment, and that the issuing of the warrant by the register does not preclude them from raising that question.

Until the patents were obtained this warrant, though assigned and entered in part on the land in controversy, conveyed only an equitable interest. Hoffman, to whom Ladd assigned it, and the other assignees, took it subject to all equities. In their hands, unless affected by the statute of limitation or lapse of time, any equity arising from the face of the instrument could be asserted against them, the same as against Ladd.

Brush, being the last assignee, obtained the patents in his own name as assignee, and these vested in him the legal estate; but this, on the principles which have been long established in relation to these titles, does not bar a prior equity. The complainants are proved to be the heirs of Hockaday, and a part of them were minors at the commencement of this suit. All of them, in age, were of tender years when the warrant was assigned, and it appears that none of them came to a knowledge of their rights until a short time before the bill was filed: and this is an answer both to the statute of limitations and the lapse of time. The statute of Ohio does not run against non-residents of the State; nor can lapse of time operate against infants, under the circumstances of this case.

The great question in this controversy is, whether Brush is chargeable with notice.

The certificate of the executive counsel of Virginia stated that "the representatives of John Hockaday were entitled to the proportion of land allowed a captain of the continental line for three years' service." To this was appended a request to the register of the land office to issue a warrant in the name of Joseph Ladd, his heirs or assigns, signed by Ware, executor of Hockaday, he having received, as stated, full value for the same.

Four military warrants, of one thousand acres each, were issued by the register "the 9th of August, 1808, to Joseph Ladd, assignee of Robert S. Ware, executor of John Hockaday, deceased."

By virtue of one of these warrants four hundred acres of the

land in dispute were entered on the 8th of June, 1809, in the name of George Hoffman, assignee, and two hundred acres in the same name the 18th of August, 1810. These entries were surveyed in May, 1810, and on the 20th of January, 1818, patents were issued to "Brush, assignee of John Hoffman, who was assignee of Joseph Hoffman *et al.*, assignees of George Hoffman, who was assignee of Joseph Ladd, assignee of Robert S. Ware, executor of Hockaday," &c.

It is insisted that the general doctrine of notice does not apply to titles of this description; and this position is true so far as regards the original entry. To make a valid entry some object of notoriety must be called for, and unless this object be proved to have been generally known in the neighborhood of the land at the time of the entry, the holder of a warrant who enters the same land, with full notice of the first entry, will have the better title; and so, if an entry be not specific as to the land intended to be appropriated, or in any respect be defective, it conveys no notice to a subsequent locator, nor can it be made good by a subsequent purchaser without notice. (*Kerr* v. *Watts*, 6 Wheat., 560.) But, with these exceptions, the doctrine of notice has been considered applicable to these military titles, as in other cases; and no reason is perceived why this rule should not prevail.

From the nature of these titles and the force of circumstances an artificial system has been created unlike any other, and which has long formed the basis of title to real estate in a large and fertile district of country. The peculiarities of this system having for half a century received judicial sanctions, must be preserved, but to extend them would be unwise and impolitic.

Brush, it is insisted, was a *bona fide* purchaser for a valuable consideration, without notice.

The answer under which this defence is set up, is neither in substance nor in form free from objection. It does not state the amount of consideration paid, the time of payment, nor does it deny the circumstances from which notice can be inferred. (*Boon* v. *Chiles*, 10 Pet., 211, 212. But, passing over the considerations which arise out of the answer, we will inquire whether the defendant is not chargeable with notice, from the facts which appear upon the face of his title.

The entry on the books of the surveyor, kept at the time in the State of Kentucky, was the incipient step in the acquisition of the title. This entry could only be made by producing to the

surveyor, and filing in his office, the original warrant, or a certified copy of it. The survey was then made, and a plat of the land, by a deputy, who returned the same to the principal surveyor's office. This survey is called the plat and certificate, and is assignable by law; but without an entry founded upon a warrant, it is of no validity. On the transmission of this survey, under the hand and seal of the principal surveyor, accompanied by the the original warrant, or a copy, to the general land office, a patent is issued to the person apparently entitled to it. In issuing the patent, the commissioner of the land office performs a ministerial duty. He examines no witnesses, but acts from the face of the papers, and exercises no judgment on the subject, except so far as regards matters of form. The patent, therefore, conveys the legal title only, leaving prior equities open to investigation.

This is the history of this title, and of every other in the same district of country. And the question arises, whether the respondent, under the circumstances, was a *bona fide* purchaser for a valuable consideration, without notice.

In his answer, he says, that he never saw the warrant, the entries nor the surveys on which the patents were founded; and that he had no information as to the derivation of the title, except that which the patents contain.

The question is not whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation, by the exercise of that diligence which the law imposes. Such purchasers are not protected.

It is insisted that, the plats and certificates being assignable, the defendant might well purchase them without a knowledge of the facts contained on the face of the warrant. But was he not bound to look to the warrant as the foundation of his title? The surveys were of no value without the warrant. No principle is better established than that a purchaser must look to every part of the title which is essential to its validity.

The warrant was in the land office of the principal surveyor; and although this, at the time, was kept in Kentucky, the defendant was bound to examine it. In this office his entries were made, and to it his surveys were returned. And from this office was the evidence transmitted on which the patents were issued. Can it be contended that the defendant, who purchased an inchoate

title—a mere equity—was not bound to look into the origin of that equity? As a prudent man, would he not examine whether that which he bought was of any value? The records of the land office, and the papers there on file, showed the origin of the title, and the steps which had been taken to perfect it. By the exercise of ordinary prudence, he would have been led to make this examination; and, in law, he must be considered as having made it.

And here the question arises, whether the statements of the warrant, which were afterwards copied into the patents, that the rights originally belonged to Hockaday, descended to his heirs on his decease, and had been assigned to Ladd by his executor, were not sufficient to put the defendant on inquiry. Now, an executor has not ordinarily any power over the real estate. His powers are derived from the will, and he can do no valid act beyond his authority. Where a will contains no special provision on the subject, the land of the deceased descends to his heirs, and their rights cannot be divested or impaired by the unauthorized acts of the executor.

The warrant then showed the purchaser that this right, which pertained to the realty, and which, on the death of Hockaday, descended to his heirs, had been assigned by the executor. Was not this notice? Was it not a fact essentially connected with the title purchased by the defendant, which should have put him upon inquiry? If it would do this, it was notice; for whatever shall put a prudent man on inquiry is sufficient. And this rule is founded on sound reason, as well as law. How can an individual claim as an innocent purchaser, under such a circumstance?

But it is argued that it would impose on the defendant an unreasonable duty, to hold that he was bound not only to examine the warrant in the land office in Kentucky, but to hunt up the will of Hockaday, and see what powers it conferred on the executor.

The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser; and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence?

The will of Hockaday was proved on the 11th day of July, 1799, before the county court of New Kent, in Virginia, and recorded in the proper records of that county. When the defendant purchased the title he knew that it originated in Virginia;

had been sanctioned by the executive council of that State, and that the warrant had been issued by the register at Richmond. These are matters of public law, and are consequently known to all. But, independently of this, every purchaser of a military title cannot but have a general knowledge of its history.

Why was not the defendant bound to search for the will? The answer given is, the distance was too great, and the place where the will could be found was not stated on the warrant, or on any of the other papers. That mere distance shall excuse inquiry in such a case, would be a new principle in the law of notice.

The certificate of the original right and the warrant were obtained in Richmond, Virginia. And in the office records and papers of the executive council, or in those of the register, in Richmond, a copy of the will probably could have been found. And if such a search had been fruitless, it is certain that it could have been found on the public records of wills of New Kent county. A search, short of this, would not lay the foundation for parol evidence of the contents of a written instrument. And shall a purchaser make a bad title good by neglecting or refusing to use the same amount of vigilance?

In the case of *Reeder et al.* v. *Burr et al.* (4 Ohio, 458), the Supreme Court of Ohio held that, where a patent was issued to Newell, as assignee of the administrator of Henson Reeder, deceased, it was sufficient to charge a subsequent purchaser with notice of the equitable rights of the heirs of Reeder.

It is difficult to draw a distinction, in principle, between that case and the one under consideration. An administrator in Ohio has no power, unless authorized by the court of common pleas, to sell or convey an interest in land; nor has an executor in Virginia any power over the realty, unless it be given to him in the will. In this case, therefore, the purchaser was as much bound to look into the will for the authority of the executor, as the Ohio purchaser was bound to look into the proceedings of the court for the authority of the administrator.

The case of *The Lessee of Willis* v. *Bucher* (2 Binn., 455), is also in point. The defendant derived his title from William Willis, to whom a patent had issued, reciting that the title was derived under the will of Henry Willis. This will did not authorize the sale of the premises, and the court held that this was notice to the defendant.

So in the case of *Jackson ex dem. Livingston* v. *Neely* (10

Johns., 374), it was held that, where a deed recited a letter of attorney, by virtue of which the conveyance was made, which was duly deposited with the clerk of Albany, according to the act of the 8th January, 1794, it was held to be sufficient notice of the power by means of the recital, to a subsequent purchaser, who was equally affected by it as if the power itself had been deposited.

An agent receiving notes from an executor, payable to him as executor, as security for advances by the principal to the executor, on his private account, and not as executor, affects his principal, with notice that it is a dealing with an executor, with the assets, for a purpose foreign to the trusts he was to discharge. (2 *Ball & Beat.* 491.)

When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact. (*Mertins* v. *Jolliffe*, Amb., 311.)

A made a conveyance to B, with a power of revocation by will, and limited other uses. If A dispose to a purchaser by will, a subsequent purchaser is intended to have notice of the will as well as of the power to revoke; and this is a notice in law. And so in all cases where a purchaser cannot make out a title but by deed, which leads to another fact, notice of which a purchaser shall be presumed cognizant; for it is *crassa negligentia* that he sought not after it. (*Moore* v. *Bennet*, 2 Ch. Ca., 246.)

Notice of letters-patent, in which there was a trust for creditors, is sufficient notice of the trust. (*Dunch* v. *Kent*, 1 Vern., 319.)

That which shall be sufficient to put the party upon inquiry, is notice. (13 Ves., 120.)

On a full consideration of this part of the case, we think that the defendant must be held to be a purchaser, with notice.

The circuit court considered the defendant as vested with a right to such part of the land as is usually given to a locator, and directed one-fourth of the two tracts to be laid off to him, so as to include his improvements; and they also decreed to the defendant three-fourths of the taxes paid by him, with interest. This part of the decree is equitable; and, as we coincide with the views of the circuit court on all the points of the case, the decree is

Affirmed.

NOTE.—A purchaser from one holding under a patent, is not bound to look behind the patent to learn if it properly issued to the one

entitled to it. *Schnee* v. *Schnee*, 23 Wis., 377. But every purchaser of land is presumed to have notice of any defect of title apparent upon the face of the patent, under which he purchases, but he is not bound to look for latent defects in the chain of assignments recited in the patent. *Moore* v. *Hunter*, 1 Gill. (Ill.), 317; *Bell* v. *Duncan*, 11 Ohio, 192.

Where the patent recites assignments by persons not legally competent, (an administrator) to convey without special authority, the purchaser under such patent, is bound to see that such authority to assign has been obtained. *Bonner* v. *Ware*, 10 Ohio, 465. But in case of an assignment referred to in a patent, as having been made by the heirs of the warrantee, the presumption is that the heirs were of full age and competent to convey. *Scott* v. *Evans*, 1 McLean, 486.

If the guardian of a minor without authority from the probate court, sell and assign a warrant issued to such minor, under the act of Congress of February 11, 1847, and the assignee locate the warrant and obtain a patent in his own name, he will be decreed to hold the land in trust for the minor child. *Mack* v. *Brammer*, 28 Ohio St., 508.

Land scrip issued under the act of May 23, 1828, to A, B and C for themselves, and in trust for the other heirs of S, the scrip was not assignable on its face, nor made so by law. The guardian of A, B and C assigned the scrip, which was afterward located and patented in the name of the assignee. *Held*, that the patentee held the interest of the heirs of S, not named in the scrip in trust for them, and that such interest in the land should be conveyed to them. *Stoddard* v. *Smith*, 11 Ohio St., 581.

If a certificate of entry issue to heirs the legal title is in them, and an assignment of the certificate by the administrator is absolutely void. *Hawkins* v. *Johnson*, 4 Blackf. (Ind.), 21.

DAVID C. WRIGHT *v.* SAMUEL E. TAYLOR.

U. S. Circuit Court, District of Missouri, 1871.—2 Dillon, 23.

Ejectment—Military Bounty Lands—Special Legislation—Curative Statutes—Deeds Defectively Acknowledged—Construction of Missouri Statutes.

Before TREAT and KREKEL, J. J.:

This was an action of ejectment to recover possession of certain land in Chariton county, Missouri, forming part of the tract appropriated for military bounties. Plaintiff claimed under a patent for the land, granted to Nicholas Columbey, dated January 4, 1819, and on the trial offered in evidence said patent, together with a power of attorney by Columbey to William Russell, dated February 23, 1816, a deed from Columbey by said Russell, his attorney, to Moses Russell, dated June 1, 1819, and also subsequent deeds making a chain of title to plaintiff.

The defendant objected to the admission of said power of attorney and the deed made thereunder, as being in violation of the acts of Congress granting bounty lands, and, therefore, void under them. Objections were also taken to other deeds offered in evidence upon the ground that some of them were imperfectly acknowledged, and that others, being copies, could not be admitted, the statutory requirements governing the admission of copies not having been complied with.

The court sustained the objections as to the power of attorney and the deed made thereunder, and rendered judgment for defendant.

Jewett & Bigger for the plaintiff.

Krum & Decker for the defendant.

TREAT, District Judge:

The court rules the following propositions:

1. In bestowing the bounty of the government upon its soldiers, Congress had an undoubted right to shape that bounty as it deemed best, either by prescribing conditions or limiting the tenure and quality of the grant.

2. The act of Congress of April 16, 1816, authorizing the designation of lands for military bounties, prohibited the alienation of said lands until after the issue of the patent therefor. *Held*, that a deed made in 1820, by the attorney of a patentee, under a power of attorney executed in February, 1816, the patent not having issued till 1819, is void *ab initio*, as being within the prohibition of the act.[1]

3. The federal court will follow the decision of the State Supreme Court as to the admissibility in evidence of certified copies of deeds without accounting for the absence of the originals, and as to the various curative acts concerning deeds improperly or defectively acknowledged, and as to the force and effect of the recording acts, whether those decisions are in accord with what are deemed sound rules of interpretation or otherwise.

4. The provision of the Missouri constitution of 1865 forbidding the enactment of special laws, giving effect to informal or invalid wills or deeds, etc., does not prevent the enactment of general curative statutes upon the subjects named, nor upon any of the other classes of subjects enumerated in that clause of the constitution; such acts being *general* in the constitutional sense, since they apply to a *class* and not to individual cases; hence, the

exceptional legislation as to military bounty lands in Missouri is not within the provision of the Missouri constitution.

5. Section 38, chap. 109, of the Revised Statutes of Missouri, pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands, is not repealed by the act of February 27, 1868 (Session Acts, 1868, p. 51), nor is the common law mode of proving the execution of deeds thereby abrogated: hence, a deed for such lands can be received in evidence where its execution is proved according to the common law mode, in the same manner as any other deed not acknowledged or recorded properly, and it will be valid between the parties and those having actual notice and mere trespassers.

6. A certified copy from the recorder's office of such deed, when the original has been recorded and acknowledged under section 35, chap. 109, Revised Statutes of Missouri, 1865, must be received in evidence upon proof of the loss or destruction of the original; and if duly acknowledged according to the laws of Missouri, a certified copy is to be received on the same terms as other deeds with valid acknowledgment.

7. A deed improperly acknowledged in New York in 1820, according to the laws both of New York and Missouri at that time, and recorded in Missouri in 1822, is not such a deed as section 35 *et seq.* of chap. 109 of the Revised Statutes of 1865 affects; and a curative act passed in New York in 1824 to operate on such imperfect acknowledgment in that State, cannot act extra-territorially and work curatively upon a deed to Missouri lands.

Judgment for defendant.

NOTE.—The elaborate opinion of Treat, J., in support of the foregoing propositions, will be found published at length in the St. Louis *Law News*, October 11, 1872, p. 32.

As to curative acts and defective certificates of acknowledgment of deeds, *Randall* v. *Kreiger*; *Morton* v. *Smith*, *post*, 2 Dillon.

1. Held the same in *Nichols* v. *Nichols*, 3 Pinn. (Wis.), 174; and *Stephenson* v. *Wilson*, 37 Wis., 482; it was also held the same in a case where the warrant was issued under act of July 27, 1812. *Rose* v. *Buckland*, 17 Ill., 309; also see, *M'Elyea* v. *Hayter*, 2 Port. (Ala.), 148.

Under a similar prohibitory act of March 1st, 1800, it was held, that no one could take advantage of the prohibition, except the donee of the United States. *Smith* v. *Shaw*, 1 McLean, 22.

The fact that a person purchased the warrant before it was issued, contrary to the act of February 11th, 1847, under which it was issued, will not constitute such purchaser a trustee of the soldier as respects the land entered with the warrant. *Adsit* v. *Smith*, 52 Ill., 412.

CHARLES MERRILL *v.* THOMAS H. HARTWELL.

Supreme Court of Michigan.—April Term, 1863.—11 Michigan, 200.—(Cooley's Annotated Report.)

Land warrant.—The holder of a land warrant has an absolute right to locate land with it, and to a patent for the land located.

Guaranty; United States officer; Ex parte action.—Plaintiff purchased a land warrant of defendant, who guaranteed it "in all respects." With this warrant, plaintiff located land, but he was afterwards notified from the land office, that the entry was suspended because the Commissioner of Pensions had canceled the warrant on the allegation that it was issued on forged papers. Plaintiff then brought suit upon the guaranty. It was *held*, that private rights could not be bound by this *ex parte* and extrajudicial proceeding of the commissioner, and that this evidence did not show plaintiff entitle to recover. (Compare *Houghton County* v. *Land Commissioner*, 23 Mich., 270; *Boyce* v. *Danz*, 29 Mich., 146.)

Heard, April 12th; decided, April 21st.

Case made after judgment from Wayne circuit, where Merrill brought action against Hartwell on a guaranty in a bill of sale of land warrants in the following words: "Guaranteed in all respects." Merrill located the warrant in question in 1854, but had received no patent, when, in 1862, he was notified by the register and receiver of the land office that the warrant was canceled by the Commissioner of Pensions, and the entry therefore suspended.

The cancellment was on the ground that the warrant, which was issued under the act of Congress of September, 1850, was obtained on false and forged papers. Merrill then brought this action. The circuit court gave judgment for defendant.

J. E. Bigelow for plaintiff.

D. C. Holbrook for defendant.

CAMPBELL, J.:

Defendant is sued as guarantor of a land warrant which he sold with a guaranty "*in all respects.*" Plaintiff located certain lands with it in 1854, and in 1862 he was notified that the entry was suspended because the Commissioner of Pensions had canceled the warrant. Suit is now brought on the guaranty claiming this to be a breach of it.

The law of 1850, under which the warrant was issued, prescribes

in what way an entry of lands may be made on such a warrant, and provides that "upon the return of such certificate or warrant, with evidence of the location thereof having been legally made to the General Land Office, a patent shall be issued therefor." (9 Stat. U. S., 520, 521), and the warrants are made assignable by the statute of 1852, (10 Stat. U. S., 3).

Whether such a guaranty contains sufficient elements of certainty to enable its holder to enforce it for any liability, except title and genuineness, is a question of some nicety. But it cannot be claimed that such a guaranty can go further than to bind the guarantor to the undertaking that the warrant is as valid as any other land warrant under the statute. The statute gives to the holder of every warrant, free from question, an absolute right to locate land under it; and the land officers who refuse to respect it are guilty of an infraction of law. It can hardly be claimed that this guaranty is a guaranty against official mistakes or misconduct. Whatever may be the power of any of the public officers in the department to decline acting when they suspect fraud, there is no principle which can justify the assumption that their decision can divest private rights or dispose of them finally by assuming to rescind the instruments under which these are asserted. A court of justice is not bound by such *ex parte* and extrajudicial proceedings, and must entirely disregard them: (*Glasgow* v. *Hortiz*, 1 Black, 595; *Tate* v. *Carney*, 24 How., 357; *Dubuque & Pacific R. R. Co.*, v. *Litchfield*, 23 How., 66; *Arnold* v. *Grimes*, 2 Clark, (Iowa,) 1; *Irvine* v. *Marshall*, 20 How., 558; *O'Brien* v. *Perry*, 1 Black, 132; *People* v. *State Treasurer*, 7 Mich., 366.) An entry made on this warrant, if the warrant itself is free from objection, gives a right to a patent under the expressed terms of the law.

It is unnecessary to decide whether the assignee of a land warrant, valid on its face, can be affected by frauds anterior to its issue; or, if he can be, in what way the validity of the instrument is to be assailed. No such attempt is made in the case before us, as there is no evidence offered tending to show fraud or forgery. The judgment below must be affirmed, with costs.

The other justices concurred.

JAMES MARKS, plaintiff in error, *v.* MICHAEL DICKSON AND ELIZABETH M. DICKSON.

December Term, 1857.—20 Howard 501 ; 2 Miller, 541.

Pre-emption.—Assignment of Certificate.

1. Under the acts of Congress concerning pre-emption of 1830 (4 Statutes, 420), as amended January, 1832 (4 Statutes, 496), and revived June 1834, (4 Statutes, 676), a pre-emptor could assign his certificate of pre-emption and location after entry at the land office.
2. Assignments of floats made before such entry were void ; but a power to assign, though made before the location, would support an assignment under it made after location.

THIS is a writ of error to the Supreme Court of Louisiana.

The case is fully stated in the opinion.

Mr. Benjamin for plaintiff in error.

Mr. Taylor for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

This cause is brought here by a writ of error to the Supreme Court of Louisiana, which, by its judgment, construed the acts of Congress of 1830, 1832, and 1834, securing pre-emption rights to actual settlers on the public lands.

The facts giving rise to the questions decided are these : John Butler and Elkin T. Jones resided on the same quarter-section of land, lying in the parish of Clairborne, Louisiana, and having duly proved their residence on the land, as required by the acts of Congress, were allowed to purchase jointly, at the proper land office, the quarter-section on which they resided.

Being entitled to additional land, Jones and Butler obtained a certificate, known as a float, authorizing them to enter a quarter-section. Butler sold his float to Murrill, in 1837 : Murrill sold to Wood in 1838, and Wood sold to Dickson in 1839. The land was located in August, 1840, in Butler's name, by Bullard, who held a power from Butler to locate and sell it.

And in November, 1840, Butler, by his attorney in fact, Bullard, conveyed to William Dickson. In April, 1843, a joint patent issued in favor of Butler and Jones for the quarter-section. In 1851, Butler again sold his undivided moiety of the land to James Marks, and conveyed to him in due form. The Supreme Court of Louisiana held that the assignment made in August, 1840, to William Dickson, was lawfully made, and that Marks had no

equity to sustain his petition, in which he demanded partition and possession. His petition was dismissed in the State Courts.

If the assignment of the entry to Dickson was valid, then the judgment below must be affirmed; on the other hand, if the assignment made by Bullard, as Butler's attorney in fact, was made in violation of the acts of Congress, then it cannot be set up as a defence against the deed made to Marks in 1851. This is the only question that can be revised here on this writ of error to the proceeding in the Supreme Court of Louisiana. Its decision depends on the true meaning of the acts of Congress referred to.

The act of 1830 (sec. 3), provides that all assignments and transfers of the right of pre-emption given by that act, prior to issuing of the patent, shall be null and void. In 1832, a supplementary act was passed, which recites the act of 1830, and declares that all persons who have purchased under the act may assign and transfer their certificates of purchase or final receipts, anything in the act of 1830 to the contrary notwithstanding.

The act of June 19, 1834, revived the act of 1830, and continued it in force for two years, without referring to the act of 1832. If this act was made part of that of 1830, then the revival of the latter carried with it no incapacity in the pre-emptor to assign his certificate of purchase.

A difficulty arose in the General Land Office as to the effect of the revival of the act of 1830 by the act of 1834; and whether the act of 1830, as revived, included the provision of the act of 1832. The commissioner referred the matter to the Secretary of the Treasury for his decision; and this officer presented the question to the Attorney General for his official opinion, who decided that the acts of 1830 and 1832 stood together as one provision; and being revived by the act of 1834, the intention of Congress was to confer on the purchaser the power to sell before the patent issued.

This opinion was given in March, 1835, and has been followed at the General Land Office ever since; and as Butler's claim originated under the act of 1834, it was governed at the land office by that decision.

We think the construction then given was, in effect, the true one. Before the prohibition was made by the act of 1830, the purchaser, when he had obtained his final certificate, acquired with it a right to sell the land he had purchased, in all cases, nor has that right ever been questioned by Congress, where entries

had been made in the ordinary operations of the land office; so that the act of 1832 repealed the prohibition imposed on those having a pre-emption, and placed those who purchased under it on the footing of other purchasers.

The act of 1832 provided that patents might issue to assignees, but this provision does not effect the present case, as the transfer of the entry was valid, and bound Butler from its date, and vested his equitable title in Dickson and his heirs, which was not defeated by the patent. Such would have been the rights of the parties had the prohibitory clause not been passed, and so their rights stood after its repeal.

The object of the legislature is manifest. It was intended to prevent speculation by dealings for rights of preference before the public lands were in the market. The speculator acquired power over choice spots, by procuring occupants to seat themselves on them, and who abandoned them as soon as the land was entered under their pre-emption rights, and the speculation accomplished. Nothing could be more easily done than this, if contracts of this description could be enforced. The act of 1830, however, proved to be of little avail, and then came the act of 1838 (5 Stat., 251), which compelled the pre-emptor to swear that he had not made an agreement by which the title might inure to the benefit of any one except himself, or that he would transfer it to another at any subsequent time. This was preliminary to the allowing of his entry, and discloses the policy of Congress, but it has no application in this cause, as this claim was founded on the act of 1834.

The contract preceding the entry made by Butler with Murrill was merely void; and so were the agreements of Wood and Dickson for the float, before its location. But, after the land was entered by Butler, he had power to affirm his contract of sale at his option, by conveying the land, and which sale bound Butler and concludes Marks.

We order that the judgment of the Supreme Court of Louisiana be affirmed, with costs.

NOTE.—A power of attorney, coupled with an interest, was executed by a pre-emptor, authorizing the attorney to locate and convey the land to which he was entitled under a floating pre-emption right. After the land was located the pre-emptor died. *Held*, that his death revoked the power of attorney to sell, because there was no estate in existence at the time the power was executed, with which an interest could be

coupled. It was a power to create an estate with power to dispose of such estate when created. A conveyance of the land by the attorney after the death of the pre-emptor was void. *Yates* v. *Pryor*, 11 Ark., 58. (For a full discussion of this subject, see *Hunt* v. *Rousmanier's Adm'r*, 8 Wheaton, 174.)

In such a case, the legislature may empower the administrator to execute a valid conveyance. *Moore* v. *Maxwell*, 18 Ark., 469.

An entry made by an agent after the death of the principal, but with his money, is valid. The heirs adopt the act of the agent by bringing an action for the land. *McClaren* v. *Wicker*, 3 Eng. (Ark.), 192.

LESSEE OF WILLIAM C. FRENCH AND WIFE, plaintiff in error, *v.* WILLIAM H. SPENCER, JR., AND OTHERS.

December Term, 1858.—21 Howard, 228; 2 Miller, 760.

Bounty Land Warrants.—Assignability.

1. Whatever may be the construction of the acts of 1811, 1812, as to the transferability of bounty land warrants issued under them, there is nothing in the act of 1816, granting bounties to American citizens residing in Canada, which forbids such transfer.
2. A deed which professed to convey the land, and also to be a power of attorney, to locate the warrant in the name of the grantee, is valid, and conveys the land which had really been entered and located. The location of the specific warrant was sufficient to identify it.
3. Though the patent issued long after the death of the party to whom the warrant was issued, and in whose name it was located, it inured to the benefit of the grantor in the deed made by him.
4. This is also true on the principle, that where a grantor sets forth that he is seized of a particular estate which he purports to convey, he and all claiming in privity with him, are estopped to deny that he was so seized at the time he made the conveyance. [1]

WRIT OF ERROR to the Circuit Court for the District of Indiana.

The case is stated in the opinion.

Mr. Thompson for plaintiff in error.

Mr. Burnett for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

Silas Fosgit obtained a warrant for three hundred and twenty acres of land as a Canadian volunteer in the war of 1812 with Great Britain. This warrant he caused to be located in the Indiana Territory, June 3, 1816, on the land in dispute. On the

twenty-eighth day of that month he conveyed the land to William H. Spencer, who died in possession of the same; it descended to his children and heirs, who continued in possession, and are sued in this action by one of the two heirs of Fosgit, who died about 1823. A patent was issued by the United States to Fosgit, dated in October, 1816. A deed from Fosgit to Spencer was offered in evidence in the circuit court on behalf the defendants, and was objected to:

1st. Because it is void on its face, being in violation of the acts of Congress touching the subject of bounty land for military services, and against the policy of the United States on that subject.

2d. Because said writing, on a fair legal construction of its terms, conveys no legal title (and, indeed, no title at all of any kind) to the lands in question; and—

3d. Because said writing is irrelevant and incompetent as evidence in this cause.

The court overruled the objections and permitted the defendants to give the writing in evidence, and instructed the jury that it was a complete defense to the action, to all of which the plaintiff excepted.

1. Was the writing void because it was in violation of acts of Congress touching the sale of bounty lands before the patent had issued? This depends on a due construction of the act of 1816. It gave to each colonel nine hundred and sixty acres, to each major eight hundred acres, to each captain six hundred and forty acres, to each subaltern officer four hundred acres, to each non-commissioned officer, musician, and private three hundred and twenty acres, and to the medical and other staff in proportion to their pay, compared with that of commissioned officers. Warrants were ordered to be issued by the Secretary of War, subject to be located by the owner, in quarter-sections, on lands within the Indiana Territory, surveyed by the United States at the time of the location. And three months additional pay was awarded to this description of troops.

By the acts of 1811, ch. 10, 1812, ch. 14, sec. 12, and that of the May 6, 1812, ch. 77, sec. 2, it was provided that each private and non-commissioned officer, who enlisted in the regular service for five years and was honorably discharged and obtained a certificate from his commanding officer of his faithful service, should be entitled to a bounty of one hundred and sixty acres of land; and

that the heirs of those who died in service should be entitled to the same, to each of whom by name a warrant was to issue. The act of May 6, 1812, provided for surveying, designation, and granting these bounty lands; the fourth section of which declares that no claim for military land bounties shall be assignable or transferable until after the patent has been granted; and that all sales, mortgages, or contracts made prior to the issuing of the patent shall be void; nor shall the lands be subject to execution sale till after the patent issues.

It is insisted that this provision accompanies and is part of the act of 1816, and several opinions of Mr. Attorney General Wirt are relied on to sustain the position that the acts granting bounty lands are in *pari materia* and must be construed alike.

He gave an opinion in 1819, (2 L. L. and Opinion 6), that a land warrant issued to a Canadian volunteer was not assignable on its face or in its nature, and consequently that the patent must issue in the name of the soldier. But he did not decide, nor was he called on to do so, that after the warrant had been located and merged in the entry the equitable title and right of possession to the land could not be transferred by contract.

The act of 1816 involves considerations different from the previous provisions for the protection of the enlisted common soldier. A class of active, efficient American citizens, who had emigrated to Canada, were compelled to leave there on the war of 1812 breaking out; they returned to their own country and went into its service, and when the war was ended, both officers and soldiers were compensated in lands and money for this extraordinary service. The act of Congress orders the warrants to be delivered to the respective owners to be located by them; whereas the common soldier, provided for in acts of 1811 and 1812, did not receive his warrant, but the government bound itself to locate the land at its own expense. Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5, 1816, has no reference to, or necessary connection with any other bounty land act; it is plain on its face and single in its purpose. And then what is the rule? One that cannot be departed from without assuming on the part of the judicial tribunals legislative power. It is that where the legislature makes a plain provision, without making any exception, the courts can make none. (*McIver* v. *Reagan*, 2 Wheaton,

25; *Patton* v. *McClure*, Martin and Yergers' Tenn. R., 345, and cases cited: *Cocke & Jack* v. *McGinnis*, *Ib.*, 365; *Smith* v. *Troup*, 20 Johns., 33.) We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made.

2. The next ground of objection to the deed is, that it conveys no title when fairly construed. It has a double aspect obviously, for the reason that the parties to it did not know at the time it was executed whether or not the land had been located by Fosgit's agent. The issuing of the warrant is recited in the deed, and the quantity of land it calls for, and then the grantor says: "For the consideration of five hundred dollars I have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land, to have and to hold the same in as full and ample manner as I, the said Silas Fosgit, my heirs or assigns, might or could enjoy the same, by virtue of the said land warrant or otherwise."

Then follows an irrevocable power from Fosgit to Spencer, his heirs or assigns, to locate the warrant, obtain a patent, &c.

The warrant having been located on land already surveyed, it could easily be identified. The description is to the same effect as if the deed had said, I convey the land covered by my warrant of three hundred and twenty acres.

We are, therefore, of the opinion that the deed was a valid conveyance of Fosgit's interest in the land sued for at the time the deed was executed.

The third exception to the deed is covered by the foregoing answers.

3. The charge of the court to the jury held, as a matter of law, that the deed was a complete defense to the action, and that the patent issued to Fosgit related back to the location of the warrant, and constituted part of Spencer's title.

This consideration involves a question of great practical importance to States and territories where entries exist on which patents have not issued, as sales of such titles are usual and numerous. The incipient state of such titles has not presented any material inconvenience, as it is usually provided by State laws that suits in ejectment may be prosecuted or defended by virtue of the title.

In Indiana it is provided by statute that, "every certificate of purchase at a land office of the United States shall be evidence

of legal title to the land therein described"—that is to say, for the purposes of alienation and transfer; and for the purposes of litigating rights of property and possession a certificate of purchase shall be treated as a legal title, and to this effect it is competent evidence in an action of ejectment. (*Smith* v. *Mosier*, 5 Black R., 51.)

After the patent issued, this title was exclusively subject to State regulations in so far as remedies were provided for its enforcement or protection, and therefore no objection can be made to any State law that does not impugn the title acquired from the United States.

Whether the patent related back in support of Spencer's deed is not a new question in this court. It arose in the case of *Loudes* v. *Brant* (10 How., 372), where it was held that a patent issued in 1845 "to Claymorgan and his heirs," by which the heirs took the legal title, related back and inured to the protection of a title founded on a sheriff's sale of Claymorgan's equitable interest made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title; the court holding that when the patent issued it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title.

It is also the settled doctrine of this court that an entry in a United States land office on which a patent issues (no matter how long after the entry is made) shall relate to the entry, and take date with it. (*Ross* v. *Barland*, 1 Peters, 655.) The fiction of relation is that an intermediate *bona fide* alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him.

4. We hold that, on another ground, the instruction was clearly proper.

Here the after-acquired naked fee is set up to defeat Fosgit's deed, made forty years ago in good faith, for a full consideration, and to oust the possession of Spencer's heirs holding under that deed. The rule has always been that where there was a warranty or covenants for title that would cause circuity of action if the vendee was evicted by the vendor, then the deed worked an estoppel.

But the rule has been carried further, and is now established, that where the grantor sets forth on the face of his conveyance, by

averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. (*Van Rensselear* v. *Kearney*, 11 How., 325: *Landes* v. *Brant*, 10 How., 374.)

It follows that the heir of Fosgit is estopped by her father's deed from disturbing the title or possession of Spencer's heirs.

It is ordered that the judgment of the circuit court be affirmed.

NOTE.—1. It was held the same in *Stoddard* v. *Chambers*, 2 How., 284, and *Irvine* v. *Irvine*, 9 Wallace, 617.

A mortgagor is estopped from denying his seisin in a suit to foreclose the mortgage. *Bush* v. *Marshall*, 6 How., 284.

Also see, *Heushaw* v. *Bissell*, 18 Wallace, 255, and *McCarthy* v. *Mann*, 19 Wallace, 20.

DAVID MAXWELL AND OTHERS, plaintiffs in error, *v.* ISRAEL M. MOORE AND OTHERS.

December Term, 1859.—22 Howard, 185.—3 Miller, 285.

Jurisdiction over State Courts.—Acts of Congress Construed.

Where the act of Congress of 1812, giving bounty lands to regular soldiers, made all sales void before the patent issued, and another act of 1826 permitted the soldier to relinquish the land already patented and make a new location. *Held*, that the restriction on sale of the right to relocate did not exist, as nothing was said to that purport in the act of 1826.

THIS is a writ of error to the Supreme Court of Arkansas. The case is fully stated in the opinion.

Mr. Fowler for plaintiffs in error.

Mr. Watkins for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

This cause is brought before us by a writ of error to the Supreme Court of Arkansas, and presents a single question for our consideration.

Allen McVey served as a regular soldier in the war of 1812, and

was entitled to a tract of 160 acres of land as a bounty for his services. The land was located and granted in what is now the State of Arkansas. By the act of May 6, 1812, which granted the bounty lands, all sales or agreements made by a grantee of these lands before the patent issued, were declared to be void.

Many tracts of the lands granted turned out to be unfit for cultivation, so that the soldier took no benefit; and as compensation, the act of May 22, 1826, declares that the soldier or his heirs, to whom bounty land has been patented in the Territory of Arkansas, and which is unfit for cultivation, and who has removed or shall remove to Arkansas with a view to actual settlement on the land, may relinquish it to the United States, and enter a like quantity elsewhere in the district, which may be patented to him. This act was continued in force by that of May 27th, 1840.

McVey surrendered his first patent according to the act of 1826, and in 1842 another issued in his name for the land in dispute.

In 1834, McVey gave William Pelham a bond to convey to him the land that might be entered on his certificate of surrender, (known as a float), and a power of attorney to locate the same, and obtain the patent. McVey died in 1836. In 1842, Pelham entered the land in controversy in McVey's name.

A special act of the legislature of the State of Arkansas was passed, authorizing McVey's administrator to convey the land to Pelham, which was done.

Afterwards, the plaintiffs in error obtained a conveyance from the heirs of McVey, on which their action of ejectment is founded. As the title vested in Allen McVey's heirs by the patent of 1842, they could well convey the land unless the administrator's deed stood in the way. (*Galloway* v. *Findley*, 13 Peters, 264.) That the special act of assembly authorized the administrator to make a valid deed, and divest the title of the heirs, was decided in this case by the Supreme Court of Arkansas, and which decision on the effect of the State law is conclusive on this court. We exercise jurisdiction to revise errors committed by State courts, where the plaintiff in error claims title by force of an act of Congress, and the title has been rejected on the ground that the act did not support it. And this raises the question, whether the act of 1826, allowing the soldier to exchange his land, carried with it the prohibition against alienation contained in the act of 1812.

The court below held that it did not, and that Allen McVey did lawfully bind himself to Pelham for title.

It is insisted that the acts of 1812 and 1826, are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first.

We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange. We can only here say, as we did in the case of *French* v. *Spencer*, (21 How., 238), that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.

There being no other question presented by the record within the jurisdiction conferred on this court by the 25th section of the judiciary act, we order that the judgment of the Supreme Court of Arkansas be— *Affirmed.*

JOHN DOE, EX DEM. MANN AND HANNAH, plaintiffs' in error, *v.* WILLIAM WILSON.

December Term, 1859.—23 Howard, 457; 3 Miller, 654.

Special Reserve to Indians in a Treaty.—Deed of Reserved Right Valid.

1. When, by the treaty of October 27, 1832, with the Pottawatomie Indians, the tribe surrendered all their rights to the lands then ceded, and the United States agreed that certain quantities should be reserved to particular Indians, these latter became tenants in common with the government of the title in fee, until the President, after surveys were made, should locate these reservations.
2. In the absence of anything in the treaty, or any act of Congress to prevent it, the individual Indian could sell and convey this title as fully as any other person.
3. Such a conveyance, made before the survey and the selection by the President, and the issue of the patent, would attach to the land when patented; and the recital in the patent that it was for the land reserved for that individual Indian, would be conclusive in favor of the purchaser as to its identity.

WRIT OF ERROR to the Circuit Court for the District of Indiana.

The case is well stated in the opinion.

Mr. Baxter for plaintiff in error.

Mr. Niles for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie tribe of Indians of the State of Indiana and Michigan territory, said nation ceded to the United States their title and interest in and to their lands in the States of Indiana and Illinois, and the Michigan territory, south of Grand river.

Many reservations were made in favor of Indian villagers jointly, and to individual Pottawatomies. The reservations are by sections, amounting probably to a hundred, lying in various parts of the ceded country. As to these, the Indian title remained as it stood before the treaty was made; and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides, that "the foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys."

In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the State of Indiana, "all those two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." The grantor covenants that he is lawful owner of the land; hath good right and lawful authority to sell and convey the same. And he furthermore warrants the title against himself and his heirs. Under this deed the defendant holds possession.

The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated in 1855, on the assumption that their ancestor's deed was void; he having died in 1833, before the lands were surveyed or the reserved sections selected. And on the trial below, the court was asked to instruct the jury "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable; he having died before the location of the land, and before the patent issued."

This instruction the court refused to give; but, on the contrary, charged the jury, that "the description of the land in the deeds from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson are sufficient to identify the land thereby intended to be conveyed as the same two sections

of land which are in controversy in this suit, and which are described in the patents which have been read in evidence."

It is assumed that the lands embraced by the patents to Pet-chi-co, made in 1837, do not lie within the section of country ceded by the treaty of 27th October, 1832; and, therefore, the court was asked to instruct the jury that the defendants cannot claim nor hold the land as assignees of Pet-chi-co by virtue of the treaty. The demand for such instruction was also refused.

There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf: that the selections for him, of sections nine and ten, had been made, "as being the sections to which the said Pet-chi-co is entitled," under the treaty. The recitals in the patents conclude all controversy on this point.

The only question presented by the record that we feel ourselves called on to decide is, whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick.

The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it.

The reservees took by the treaty, directly from the nation, the Indian title: and this was the right to occupy, use, and enjoy the lands in common with the United States, until partition was made in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded: but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which for the purposes of this controversy for possession.

The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the government of acquiring the right. (*Johnson* v. *McIntosh*, 8 Wheat., 603; *Comet* v. *Winton*, 2 Yerger's R., 147.)

Although the government alone can purchase lands from an Indian nation, it does not follow that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest.

The Indian title is property, and alienable, unless the treaty had prohibited its sale. (*Comet* v. *Winton*, 2 Yerger's R., 148; *Blair and Johnson* v. *Pathkiller's Lessee*, 2 Yerger, 414.)

So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain.

We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living.

We order the judgment to be affirmed.

CREWS AND SHERMAN, appellants, *v.* BURCHAM AND OTHERS.

December Term, 1861.—1 Black, 352; 4 Miller, 499.

Indian Title in Reserve of Treaty.

1. A reservee under the treaty with the Pottawatomie Indians of 1832 has an inchoate equitable title to the land reserved, and though its locality is only ascertained after the President shall have located and designated it, it is still subject to valid sale and assignment by the reservee.
2. Where the patent issues in such case to the reservee from the United States during the life of the grantee, it enures to the benefit of his assignee or grantee, and if after his death, the same result follows, under the act of May 20, 1836. 5 U. S. Stats., 31.
3. Though the legal title be in complainant in a bill in chancery, it can be maintained to quiet title, to relieve it of clouds, and to prevent multiplicity of litigation.
4. The question whether the land, as patented, lies within the original treaty lands, cannot be raised by any one but the United States
5. Purchasers from the heirs of the reservee cannot claim to be innocent purchasers without notice, when the deed of reservee was on record.
6. *Doe et al.* v. *Wilson*, 23 How., 457 (3 Miller, 654), commented on and explained.

APPEAL from the Circuit Court for the Northern District of Illinois.

The case is well stated in the opinion.

Mr. Armington and *Mr. Baxter* for appellants.

Mr. Carlisle and *Mr. Niles* for appellee.

MR. JUSTICE NELSON delivered the opinion of the court.

This bill was filed by the appellees, the complainants below, against the defendants, to enjoin a suit at law to recover a part of fractional section 24, in township 31, Illinois. By a treaty with the Pottawatomie tribe of Indians of October 27, 1832, the nation ceded to the United States all their lands in Illinois and other States, subject to certain reservations, for which patents were to be issued. Provision was made in the treaty that the reservations should be selected under the direction of the President of the United States after the land was surveyed, and the boundaries should correspond with the public survey. Francis Besion, a member of the tribe, was a reservee of one half-section of land under this treaty. As we have said, the treaty bears date 27th October, 1832. On the 4th of February following Besion conveyed, for a valuable consideration, all his right and interest in the half-section to William Armstrong, under whom the complainants below derive their title. The selection of the half-section was made by the President in pursuance of the treaty, and a patent was issued on the 17th February, 1845, for the same to Besion and his heirs, with an *habendum* clause, "to have and to hold the said tract, with the appurtenances, unto the said Francis Besion, his heirs and assigns." Besion died in 1843, before the issuing of the patent. The defendants set up a title to the tract under conveyances from the heirs of the reservee, claiming that the deed from him to Armstrong carried with it no right or title to the half-section which was subsequently selected and patented. The decree of the court below was in favor of the complainants, enjoining the suit at law, and restraining the institution of others for the purpose of quieting the title.

The main and controlling questions involved in this case were before the court in the case of *Doe et al.* v. *Wilson*, reported in 23 How., 457, which arose under a reservation in this treaty in behalf of the chief Pet-chi-co.

It was there held that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee.

It is true that no title to the particular lands in question could vest in the reservee or in his grantee until the location by the

President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed and to issue the patent is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee; or, in case he had parted with his interest, in favor of his grantees; and the obligation is not the less imperative and binding because entered into by the government. The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect: and the only objection of any plausibility is the technical one as to the vesting of the legal title.

The act of Congress May 20, 1836 (5 U. S. St., 31), provides: "That in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, or assigns of such deceased patentee, as if the patent had issued to the deceased person during life."

We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half-section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same, with a full covenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this act of Congress. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime.

The warranty estops the grantee and all persons in privity with him from denying that he was seized. The estoppel works upon the estate, and binds the after-acquired title as between parties and privies. (11 How., 325; 21 *Ib.*, 228.)

Some expressions in the opinion delivered in the case of *Doe* v.

Wilson, the first case that came before us arising out of this treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession, and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title.

An objection was taken that a portion of the half-section embraced in the patent to Besion did not lie within the district of country ceded by the treaty. The same objection was taken in the case of *Doe* v. *Wilson*, and the answer given was the recitals in the patent, that the sections were those selected by the President, and to which the reservee was entitled under the treaty, were conclusive on the point; and we may add, that certainly no third party has any right to complain if the facts were as alleged.

An objection was also taken that if the complainants held the legal title to the premises in question, their remedy was at law, and not in equity: but the answer is, that the bill was filed by the complainants, among other things, to relieve their title from the embarrassment of the adverse claims set up under the deeds from the heirs of Besion, and also to restrain a multiplicity of suits. It appears that a portion of the land has been laid out in town lots, which are held under the complainant's title.

A further objection was taken that the defendants are *bona fide* purchasers for a valuable consideration: but the answer is, that the deed from Besion to Armstrong, which referred specially to this reserved right to the half-section, was duly recorded before the purchase of the defendants; and besides, those deriving title under this deed to Armstrong were in possession of the tract, claiming title to the whole at the time, which operated as notice to the subsequent purchasers.

The decree of the court below affirmed.

GEORGE W. GILBERT ET AL. *v.* GEORGE THOMPSON.

Supreme Court of Minnesota, July Term, 1869.—14 Minnesota, 544.

FIRST. A simple power of attorney to sell land, executed by a Sioux

half-breed, is good till revoked, and will extend to land subsequently acquired by means of scrip, issued under the act of Congress of July 17, 1854, if such land come within its terms.

SECOND. Such power of attorney cannot be defeated by parol proof that by it the parties intended to effect a transfer of the scrip.

THIRD. A party objecting to the introduction of evidence, must state his point so definitely, that the court may intelligently rule upon it, and that the opposite party may, if the case will admit of it, remove the objection by other evidence.

This action was commenced in the District Court for Wabasha county. The complaint alleges title in fee, and right of possesion in the plaintiff, to certain real estate in said county; that the defendant is wrongfully in, and unlawfully withholds the possession, and demands judgment for possession, &c. The defendant answered admitting possession, denying all the other allegations of the complaint, and avering title in himself.

The cause was tried before the court, assisted by a jury. It appeared on trial, that both parties claimed title through one Amelia Monette, who was the original grantee of the United States, and a half-breed of the Dakota or Sioux Indians.

The plaintiffs claimed through a deed from said Amelia dated May 29, 1867, and possession in the defendant being admitted, they introduced this deed in evidence and rested. The defendant claimed through a conveyance from the said Amelia, executed by her, by her attorney in fact, Benjamin Lawrence, dated July 18, 1857.

He offered this deed in evidence. The plaintiff objected to its reception on the ground "that it was not executed in form to admit to record; that in form the deed was an absolute nullity, as it was not in the form required for conveyances of real estate;" the court overruled the objection, the deed was introduced, and plaintiffs excepted. The defendent also introduced the power of attorney from the said Amelia to said Benjamin Lawrence, under which this deed was executed, dated May 27, 1857. This power of attorney authorized the said Lawrence to act for the said Amelia as follows: For me and in my name, to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seized, situated in the county of Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole, or any part thereof, * * * * and for me and in my name, to make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof, good and

sufficient conveyances, &c. After introducing this power of attorney and deed, the defendant rested.

The plaintiff then offered to prove that the said Amelia, as a half-breed of the Dakota or Sioux Indians, received from the United States certificates or scrip, issued under the act of Congress of July 17, 1854, that at the date of the power of attorney in evidence she transferred and delivered to one A. P. Foster said scrip, for a money consideration; that the power of attorney was executed and delivered to said Foster; that a part of said scrip was afterwards located upon the land in question by said Foster, and the deed put in evidence by defendant afterwards executed under that power of attorney, that the consideration in the deed was paid to Foster; all the negotiations had with him, and that Lawrence, said Amelia's attorney in fact, had nothing to do with the transaction except to sign the deed as directed by Foster; that the whole transaction was designed to evade and defeat said act of Congress.

The defendant objected to the reception of such evidence, on the ground that it was incompetent, irrelevent and immaterial; the court sustained the objection and plaintiff's excepted.

The jury found a verdict for the defendant, the plaintiff's made a motion for a new trial which was denied, and they appealed from the order denying the same to the court.

John N. Murdock and *Wilder & Williston* for appellants.

Campbell & Birdsay and *Mitchell & Yale* for respondent.

By the Court—GILFILLAN, CH. J.:

The act of Congress of 1854, under which Sioux half-breed scrip was issued, provides "that no transfer or conveyance of any of said certificates or scrip shall be valid." It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip, itself, the half-breed had nothing which he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would be vested in him, just as though no such attempt had been made.

Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable. A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same: it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a half-breed, is good till revoked, and would extend to land subsequently acquired by means of scrip, if such land came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases.

The intent to transfer the scrip not being illegal, but only ineffectual, could not affect the power where not expressed in the same instrument, or in one equal in degree, as evidence.

Whether the power would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do do not decide.

When the deed executed by the attorney was offered in evidence, the plaintiffs objected to it on the grounds "that it was not executed in form to admit to record; that, in form, the deed was an absolute nullity, as it was not in the form required for conveyances of real estate." From this, neither the defendant nor the court below could know what precise objection was intended. Under it, the specific objection is made here that the acknowledgment is defective, and that the land is described by employing initial letters to designate the subdivisions. The objection made below, does not point out either of these objections. A party objecting to the introduction of evidence, must state his point so definitely that the court may intelligently rule upon it, and the opposite party may, if the case will admit of it, remove the objection by other evidence. As there was no question of record notice, both these objections, if they had been well founded, might have been removed: that to the acknowledgment, by common law proof of the execution, and that to the description, by proof of the sense in which the parties read the initials. (1 Greenleaf Ev., (12 ed.) sec. 282 *et seq.*)

The order appealed from is *Affirmed.*

McGarrahan v. Mining Company.

October Term, 1877.—6 Otto, 316.

1. The statutory provisions prescribing the manner in which a patent of the United States for land shall be executed are mandatory. No equivalent for any of the required formalities is allowed, but each of the integral acts to be performed is essential to the perfection and validity of such an instrument. If, therefore, it is not actually countersigned by the recorder of the General Land Office in person, or in his absence, by the principal clerk of private land claims as acting recorder, it is not executed according to law, and does not pass the title of the United States.
2. The record in the volume kept for that purpose, at the General Land Office at Washington, of a patent which has been executed in the manner which the law directs, is evidence of the same dignity[1], and is subject to the same defences as the patent itself. If the instrument, as the same appears of record, was not so executed, and was therefore insufficient on its face to transfer the title of the United States, the record raises no presumption that a patent duly executed, was delivered to and accepted by the grantee.
3. The act of March 3, 1843 (5 Stat., 627), in relation to exemplifications of records, does not dispense with the provisions of law touching the signing and countersigning. The record to prove a valid patent, must still show that they were complied with. The names need not be fully inserted in the record, but it must appear in some form that they were actually signed to the patent when it was issued.
4. The failure to record a patent does not defeat the grant.

Error to the Supreme Court of the State of California.

This was ejectment by William McGarrahan in the District Court of the twentieth judicial district of California in and for Santa Clara county against the New Idria Mining Company, to recover possession of certain lands in that State known as the Rancho Panoche Grande. He claimed them under a patent therefor which he alleged had been issued by the United States to Vicente P. Gomez, his grantor, under the act of Congress to ascertain and settle the private land claims in the State of California, approved March 3, 1851. (9 Stat., 631.) The patent was not produced upon the trial; but the plaintiff put in evidence a certified copy of an instrument as the same was recorded in a volume kept at the General Land Office at Washington, for the recording of patents of the United States for confirmed Mexican land grants in California, being volume 4 of such records, upon pages 312 to 321 inclusive. The concluding portion of that copy is as follows:

"In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

[L. S.] "By the President: ABRAHAM LINCOLN.

"By W. O. Stoddard, *Secretary*,

"*Acting Recorder of the General Land Office.*"

As the only question decided by this court is whether the exemplification admitted on the trial of the cause shows upon its face the execution of a patent sufficient in law to pass the title of the United States, no reference is made to the other points which arose in the court below and were elaborately discussed by counsel here.

The district court rendered judgment for the defendant, which was affirmed by the supreme court. McGarrahan then sued out this writ of error.

Mr. Montgomery Blair, *Mr. Matt. H. Carpenter*, and *Mr. Chas. P. Shaw* for the plaintiff in error.

The recording of a document which the law authorizes to be recorded is evidence of the pre-existence of all that is necessary to authorize the recording. (*Farrar* v. *Fessenden*, 39 N. H., 268; *McCauley et al.* v. *State*, 21 Md., 556; *Warner* v. *Hardy*, 6 *Id.*, 525; *Barton* v. *Murrain*, 27 Mo., 235; *Patterson* v. *Winn*, 5 Pet., 239.)

The requirement that patents for lands shall be countersigned by the recorder of the General Land Office is merely directory, and the countersigning of such an instrument is not essential to its validity. (Sedgwick Stat. and Const. Law, 368, 374; *Rex* v. *Inhabitants of Birmingham*, 9 Barn. & Cress., 925; *Cole* v. *Green*, 6 Man. & G., 872; *Gale* v. *Mead*, 2 Den., (N. Y.) 160; *Marchant* v. *Longworthy*, 3 *Id.*, 526; *People* v. *Livingston*, 8 Barb., (N. Y.) 253; *Juliand* v. *Rathbone*, 39 *Id.*, 101; *Ayres* v. *Stewart*, 1 Overt., (Tenn.) 221; *Hickman* v. *Boffman*, Hard., (Ky.) 348; *Spencer* v. *Lapsley*, 20 How., 264; *United States* v. *Sutler*, 21 *Id.*, 170; *Williams* v. *Sheldon*, 10 Wend., (N. Y.) 654; *Hedden* v. *Overton*, 4 Bibb, (Ky.) 406; *Exum* v. *Brister*, 35 Miss., 391; *Blount* v. *Beabury*, 2 Hayw., (N. C.) 542; *Philips* v. *Erwin*, 1 Overt., (Tenn.) 235; *Reid's Lessee* v. *Dodson*, *Id.*, 313; *Lessee of Stephens* v. *Bear*, 3 Binn., (Pa.) 31; *Lessees of Welter* v. *Beecher*, 3 Wash., 375.)

If the name of the recorder be omitted in the record the first section of the act of March 3, 1843, (5 Stat., 627), cures the defect by making the mere record of the patent conclusive of its due execution, and copies of such record of the same validity in "evidence as if the names of the officers signing and countersigning the same had been fully inserted in said record."

Mr. Jermiah S. Black contra.

Patents for private land claims are not valid unless countersigned and sealed by the recorder of the General Land Office. (2 Stat., 716, sect. 8; 5 *Id.*, 111, sect. 6; *Id.*, 416, sects. 1, 2: *United States* v. *The Commissioner*, 5 Wall., 563; *The Secretary* v. *McGarrahan*, 9 *Id.*, 248; 3 Op. Att'y Gen., 140, 167, 630.

Mr. Chief Justice Waite delivered the opinion of the court.

The Federal question in this case is whether the record in the volume kept at the General Land Office at Washington for the recording of patents of the United States issued upon California confirmed Mexican grants, relied upon by McGarrahan as evidence of his title, proves a conveyance by the United States of the land in controversy to Vicente P. Gomez, his grantor. In his behalf it is contended that the record is itself the grant; or, if not, that it proves the issue to Gomez of a patent which does grant the legal title to the property described.

That the record is not itself the grant of title is evident. The thirteenth section of the act "to ascertain and settle the private land claims in the State of California" (9 Stat., 631) provides that "for all claims finally confirmed. * * * A patent shall issue to the claimant upon his presenting to the General Land Office an authentic copy of such confirmation and a plat of the survey," &c. By sect. 8 of the "act for the establishment of a general land office in the Department of the Treasury," (2 *Id.*, 717), it is enacted that "all patents issuing from the said office shall be issued in the name of the United States and under the seal of said office, and be signed by the President of the United States, and countersigned by the commissioner of said office, and shall be recorded in said office in books to be kept for the purpose." Thus the patent executed in the prescribed form which issues from the General Land Office is made the instrument of passing title out of the United States.

The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent,

because, like the patent, it shows that a patent containing the grant has been issued.

The record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument, such as is there copied, has actually been prepared for issue from the General Land Office. If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient no such presumption arises. In short, the record, for the purposes of evidence, stands in the same position, and has the same effect as the instrument of which it purports to be a copy.

The same defences can be made against the record as could be made against the instrument recorded. The public records of the executive departments of the government are not like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department.

This brings us to inquire whether this record shows upon its face the execution of a patent sufficient in law to transfer the title of the premises in controversy from the United States. And here it may not be improper to note that, although the case shows that in July, 1870, before this suit was commenced, the Commissioner of the General Land Office and the recorder caused to be entered upon the face of the record, over their official signatures, a statement to the effect that the instrument in question was never in fact executed or delivered. McGarrahan rests his whole case upon the record and the evidence it furnishes. This he has the undoubted right to do; but, if he does, he must stand or fall by what it proves. It is his own fault, if, having a valid patent in his possession, he fails to produce it.

By the first section of the "Act to reorganize the General Land Office" (5 Stat., 107), it was provided that the executive duties relating "to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States;" and by the fourth section, "that there shall be appointed by the President, by and with the consent of the Senate, a recorder of the General Land Office, whose duty it shall be, in pursuance of instructions

from the commissioner, to certify and affix the seal of the General Land Office to all patents for public lands, and he shall attend to the correct engrossing, and recording, and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees and of persons entitled to patents. * * *" By the sixth section, it was further provided that "it shall be lawful for the President of the United States, by and with the advice and consent of the Senate, to appoint a secretary * * * whose duty it shall be, under the direction of the President, to sign, in his name, and for him, all patents for lands sold or granted under the authority of the United States." By the second section of the act of March 3, 1841 (*id.*, 416), the duty of countersigning patents was transferred from the Commissioner of the General Land Office to the recorder.

Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office, and countersigned by the recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands.

Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may prescribe, but what this does.

Neither the signing, nor the sealing, nor the countersigning, can be omitted, any more than the signing, or the sealing, or the acknowledgment by a grantor, or the attestation by witnesses, when, by statute, such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands cannot be conveyed except in the form provided by law.

But if either of the requisites to the due execution of a patent may be considered as directory, the countersigning by the recorder should not be permitted to occupy that position.

The President may sign by his secretary, but the recorder must sign himself. He countersigns, that is to say, signs opposite to and after the President, by way of authentication. Being

specially charged with the duty of attending to the issue of patents, it is peculiarly appropriate that his attestation should be the last act to be performed in the perfection of the instrument, and that he should do it personally.

The record in this case shows an instrument in the form of a patent, signed in the name of the President, and sealed.

The place for the signature of the acting recorder is left blank. The name of the President is signed by his secretary. The claim which is made, that Stoddard, the secretary, also countersigned as acting recorder, is not sustained by the evidence. His signature appears only as secretary, and there is nothing whatever to indicate that he attempted to act as recorder.

Besides, the law provides (5 Stat., 111, sect. 8), "that whenever the office of recorder shall become vacant, or in case of the sickness or absence of the recorder, the duties of his office shall be performed *ad interim* by the principal clerk on private land land claims." It certainly is not to be presumed that the same person will hold at the same time the offices of secretary to the President for signing patents, and of principal clerk on private land claims. And if it were, his signature as secretary will not be treated as his signature as recorder *ad interim* or acting recorder. He must sign both as secretary and as recorder.

The case is, therefore, one in which the record shows upon its face an instrument prepared for a patent but not countersigned by the recorder. If a patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant actually perfected. But it is said that the record of the paper is evidence of the fact that the recorder recognized its completeness, and is equivalent to its counter-signature. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the government. To be valid a patent must be actually executed. Before it can operate as a grant, the last formalities of the law prescribed for its execution must be complied with. No provision is made for an equivalent to these formalities. Even an actual delivery of the patent by the recorder in person would not supply the place of his counter-signature, any more than the delivery of a paper by a private person without being signed would make it his deed.

But the record of a patent would not be necessarily as much a recognition of its validity as a personal delivery by the recorder, because he only attends to the recording, and is not required to

do it in person. The only way in which he can lawfully and effectually recognize the validity of a patent is by personally countersigning it.

Again it is said that the act of March 3, 1843 (5 Stat., 627), remedies the defect, because it provides "that literal exemplifications of any such records which may have been or may be granted in virtue of the provisions of the seventh section of the act * * * entitled 'An act to reorganize the General Land Office,' shall be deemed and held to be of the same validity in all proceeding, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record." This act does not, however, dispense with the signing and countersigning.

The record, to prove a valid patent, must still show that these provisions of the law were complied with. The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued. If they are partially inserted in the record, it will be presumed that they fully appeared in the patent, but no such presumption will be raised if no signature is shown by the record. Here no signature does appear, and consequently none will be presumed.

The failure to record the patent does not defeat the grant. It only takes from the party one of the means of making his proof. If he can produce the patent itself, and that is executed with all the formalities required by the law, he can still maintain his rights under it. He is not, therefore, necessarily deprived of his title because of a defective record. He is in no worse condition with the signatures omitted than he would have been if the description of his land had been erroneously copied, or other mistakes had been made which rendered the record useless for the purposes of evidence.

A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. It is undoubtedly true that, when a right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record

will be treated as presumptive evidence of its delivery to and acceptance by the grantee. But until the patent is complete, it cannot properly be recorded, and consequently an incomplete record raises no such presumption.

Again, it is said that the record of an instrument which the law requires to be recorded is *prima facie* evidence of the validity of the instrument. That is undoubtedly true, if the instrument recorded is apparently valid. The presumption arising from the record is, that whatever appears to have been done, actually was done. If the record shows a perfect instrument, the presumption is in favor of its validity: but if it shows an imperfect instrument, a corresponding presumption follows. Here the instrument recorded appears to have been incomplete, and consequently it must be presumed to be invalid. This presumption will continue until overcome by proof that the instrument as executed and delivered was valid.

We are of the opinion that, because this record does not show a patent countersigned by the recorder, it is not sufficient to prove title in the party under whom McGarrahan claims. This makes it unnecessary to consider any of the other questions which have been argued; and the judgment is *Affirmed.*

Mr. Justice Field and Mr. Justice Harlan took no part in the decision of this cause.

Note.—1. An exemplification of a public grant, under the great seal, is admissible in evidence, as record proof of as high a nature as the original patent. *Patterson* v. *Winn*, 5 Peters, 233.

The government, as appeared by the exemplification of the record of a patent, had granted January 10th, '818, to A the northeast quarter of a certain tract of land, in pursuance confessedly of a warrant and location upon that quarter; the exemplification of the record of the patent, however, showing that eight years after the date of the patent, the following memorandum had been made on this record, but by whom did not appear:

"*Indorsed.*

"This patent was issued for the S. E. quarter instead of the N. E. quarter, as recorded; sent certificate of that fact to E. B. Clemson, at Lebanon, Illinois. See his letter of 19th May, 1826."

Held, that the memorandum on the record being no part of the record, and but the memorandum of a third person, could not be received in evidence to contradict the record. *Branson* v. *Wirth*, 17 Wallace, 32.

JOHN BELL, plaintiff in error, *v.* COLUMBUS C. HEARNE AND OTHERS.

December Term, 1856.—19 Howard, 252; 1 Miller, 670.

Error to State Court.—Validity of Patent for Land.

1. Where the question decided by the State court is, that a patent for land from the United States is invalid, the party claiming under that patent can bring a writ of error to this court.
2. Where the register and receiver of the land office received plaintiff's money, gave him the usual patent certificate, but by mistake reported it to the General Land Office as James Bell instead of John Bell, the patent issued to James Bell may be recalled and canceled, though it may have been sent to the register of the land office for him, but never delivered.
3. Such a patent conveys no title, and cannot affect the title under the patent afterwards rightfully issued to John Bell.

THIS was a writ of error to the Supreme Court of the State of Louisiana.

The case is fully stated in the opinion.

Mr. Baxter and *Mr. Johnson* for plaintiff in error.

Mr. Lawrence and *Mr. Taylor* for defendants.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

This is a writ of error to the Supreme Court of Louisiana, under the 25th section of the Judiciary Act of September, 1789.

The plaintiff commenced a petitory action in the district court of Caddo parish, Louisiana, for a parcel of land in the possession of the defendants. He claims the land by a purchase from the United States, and exhibits their patent for it, bearing date in June, 1850, with his petition. The defendant (Hearne) appeared to the action, and answered that the United States had sold the land to James Bell, and as the property of James Bell it had been legally sold by the sheriff of Caddo, under a valid judgment and execution against him, and that a person under whom he (Hearne) derives his title was the purchaser at the sheriff's sale. A number of parties were cited in warranty, and answered to the same effect. A judgment was given for the defendants in the district and supreme courts, and upon the judgment in the last the plaintiff prosecutes this writ of error.

The title of the plaintiff consists of the duplicate receipts of the receiver of the land office at Natchitoches, Louisiana (No.

1,270), dated in July, 1839, by which he acknowledges the receipt from the plaintiff of full payment for the lands described in the receipt and petition, a patent certificate of the same date and number from the register of that office certifying the purchase of the plaintiff and his right to a patent, and a patent issued in due form for the said lands, in pursuance of the act of Congress, and the patent certificate.

The case of the defendants originates in these facts: The register of the land office at Natchitoches, in making up his duplicate certificate of purchase to be returned to the General Land Office, inserted the name of James Bell for that of John Bell. That certificate was sent to the General Land Office with the monthly returns of the register, and in July, 1844, a patent was issued in the name of James Bell, and sent to the register at Natchitoches, who retained it in his office till 1849. In 1849 John Bell sent to the office of the register his duplicate receipts, and the patent in the name of James Bell was delivered to him. Upon a representation of the facts to the Commissioner of the General Land Office this patent was canceled and a new one issued to the plaintiff.

It appears from the proof in the case that the plaintiff had a brother named James Bell, who was his agent for making the entry, and that the land was sold in March, 1844, as his property by the sheriff of Caddo, as is stated in the answers of the defendants.

The act of Congress of the 24th April, 1820, providing for the sales of the public lands of the United States, enacts: "That the purchaser at private sale shall produce to the register of the land office a receipt of the treasurer of the United States, or from the receiver of public moneys of the district for the amount of the purchase money on any tract, before he shall enter the same at the land office." At various times since the passage of the act the modes of conducting sales at the different land offices of the United States have been prescribed by the commissioner, and the evidence to be afforded to the purchaser designated. The circular issued in 1831 contains the instructions under which the local officers were acting at the date of this entry. The instructions pertinent to this case are, that "when an individual applies to purchase a tract of land he is required to file an application in writing therefor; on such application the register endorses his certificate, showing that the land is vacant and subject to entry, which certificate the applicant carries to the receiver, and is evi-

dence on which the receiver permits payment to be made, and issues his receipt therefor; the duplicate of this is handed to the purchaser as evidence of payment, and which should be surrendered when a patent forwarded from the General Land Office is delivered to him. The other receipt is handed to the register, who must immediately indicate the sale on his township plat, and enter the same on his tract-book, and is transmitted to the General Land Office with the monthly abstract of sales and certificates of purchase."

The certificates of purchase are made according to forms furnished by the General Land Office; one is issued to the purchaser and another is retained, to be sent to the commissioner. They should be duplicates; and the instructions to the register in regard to them are, "that the designation of the tract in the certificates of purchases is always to be in writing, not in figures. The certificates are to be filled up in a plain, legible hand, and great care is to be taken in spelling the names of the purchasers. The monthly return must always be accompanied by the receiver's receipts and register's certificates of purchase." From this statement of the act of Congress and the regulations of the land office it will be seen that the embarrassment in which this title is involved proceeds from an error committed by the register at Natchitoches in making up the duplicates of his certificate of purchase—the duplicate intended for the General Land Office—and from which the monthly abstract was prepared.

The plaintiff was nowise responsible for this. He had paid his money into the receiver's office, and obtained the receipt prescribed by the act of Congress of 1820, before cited.

He had obtained his certificate of purchase, evincing his title to a patent certificate. At this stage of the proceeding, the register of the land office, in completing his office papers, and in making up his returns for Washington city, committed a mistake, which was not detected by the officers at Natchitoches in compairing their returns, (as they are ordered to do), and eluded the vigilance of the officer at Washington. It was discovered at Natchitoches, when an agent for the plaintiff applied for the patent, and surrendered his duplicate receipt and certificate.

It was then discovered that the christian name of the plaintiff had been inaccurately set out in the returns at Washington and the patent. The Supreme Court of Louisiana say:

"It appears from the evidence, that the plaintiff and his brother,

James Bell, purchased the land in dispute from the United States on the same day—3d July, 1839—and that the patent certificates were issued in their respective names by the register of the land office at Natchitoches, Louisiana, bearing the same number."

We interpret the papers from the land office differently from the Supreme Court. There is no evidence, in our opinion, of more than one sale—that evinced by the receiver's receipt—and in that receipt, John Bell, the plaintiff, is named as the purchaser. We think there was but one certificate of purchase issued to a purchaser—that in favor of John Bell. The certificate of purchase which contains the name of James Bell is found in the General Land Office. If that was intended for a James Bell there should have been another for John Bell. But there is only a single certificate there, and the conclusion is irresistible, that the name James was entered by mistake for John. We find no evidence in the record to show that James Bell held any evidence of a purchase.

Whatever appearance of a title he had, is owing to the mistake in the duplicate certificate returned to the General Land Office, and the patent issued in his name. But this patent was never delivered to him. The question then arises, had the Commissioner of the General Land Office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertance, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain.

The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. Our conclusion is, that the Supreme Court of Louisiana erred in denying the validity of this title, and in conceding any effect or operation to the certificate of purchase or patent issued in the name of James Bell, as vesting a title in a person bearing that name.

It is objected that this court has no jurisdiction over this judgment of the Supreme Court of Louisiana.

The plaintiff claimed the land described in his petition, under a purchase made from the United States, and produced muniments of title issued by their authority, and this title is pronounced to be inoperative by the District and Supreme Courts of Louisiana.

Does this appear by the record before us? The record in the Supreme Court of Louisiana purports to be a true and faithful transcript of the documents filed, orders made, proceedings had, and evidence adduced, on the trial in the district court. The supreme court possesses the right, and is under the obligation of examining questions of fact as well as of law, and to state the reasons of their judgment. The statement of the evidence adduced is taken as an equivalent for a statement of the facts by the district judge in the practice of that court. It clearly appears that the ground upon which the judgment in the supreme court was given, was the invalidity of the title of the plaintiff, because an older patent had been issued in favor of James Bell. We think this court has jurisdiction. (*Armstrong* v. *Treasurer, &c.*, 16 Pet., 261; *Grand Gulf R. R. and B. Co.* v. *Marshall*, 12 How., 165; *Almonester* v. *Kenton*, 9 H., 1.)

Judgment reversed.—Cause remanded.

NOTE.—When a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the Secretary of the Interior may recall it from the local land office. *Maguire* v. *Tyler*, 8 Wall., 650.

After a patent has been issued and transmitted to the local land office for delivery, the commissioner may recall it, and if in his opinion, it was issued to the wrong person, he may cancel it and issue another patent to the proper person. *Phillips* v. *Sherman*, 36 Ala., 189.

THEODORE LE ROY *v.* CHARLES CLAYTON ET AL.

U. S. Circuit Court, District of California, January, 1874.—2 Sawyer, 493.

1. *Patent Delivery.*—A personal delivery of a patent to the patentee is not necessary to the vesting of the title.
2. *Patent Recalled with consent of Patentee.*—A patent in due form signed by the President, sealed with the seal, and duly recorded in the records of the General Land Office, issued upon a Mexican grant of land in California, confirmed in pursuance of the act of Congress of 1851, and subsequent acts, was sent to the United States surveyor-general for California to be delivered to the confirmee. The party

entitled refused to accept the patent, on the ground that it was erroneously located, and of defects in the proceedings prior to the patent, and petitioned the Commissioner of the General Land Office on those grounds to recall the patent and order a resurvey, which was granted. *Held:*

1. That the commissioner of the land office had power, under the circumstances, and with the consent of the party in interest, to recall the patent and order a resurvey.
2. That having power to recall the patent in a proper case, with the consent of the patentee, he had power to determine whether the application and evidence presented a proper case for recall, and that his action is not void by reason of any error, if any error there be, in determining that question.
3. *Jurisdiction* defined to be the power to hear and determine.
4. *Patent canceled without consent of patentee.*—A subsequent survey having been made, and another patent duly signed, sealed and recorded, being in all respects regular and in due form on its face, the Commissioner of the General Land Office transmitted it to the United States surveyor-general for California, for delivery to the proper party; but before its arrival in California recalled it by telegraph, and upon its return, without the knowledge or assent of the claimants, canceled the patent. The claimant, as soon as it was known acquiesced in, and claimed under the patent. *Held:*
1. That the patent took effect from the moment when it was signed and duly sealed.
2. If not, that the recording of the patent, and its transmission to the surveyor-general for California to be delivered, constituted a delivery, and the title passed.
3. That the title having vested under the patent, the Secretary of the Interior had no power to recall or cancel the patent, without the consent of the patentee.
4. That the patent being valid on its face, cannot be collaterally impeached by matter *dehors* the patent, in an action at law brought into the national courts to recover the land purporting to be granted by it.
5. That the only mode of impeaching the patent, is by a direct proceeding in the proper form, as by bill or information, in a court of competent jurisdiction against the patent, to annul or repeal it.

Before SAWYER, Circuit Judge:

This is an action to recover land. The premises are claimed to be a part of the rancho "Gaudalupe," situated in the county of Santa Barbara, granted by the Mexican authorities to Diego Olivera and Teodora Arrellanes. The grant was duly presented for confirmation, and confirmed under the act of Congress of 1851, applicable to the subject. It was surveyed under the act of

1860, and on June 30, 1866, the Commissioner of the General Land Office, in due form, issued a patent, which was signed by the President, sealed with the seal of the General Land Office, and duly recorded in the records of that office. The patent contained all the usual recitals in cases of grants of the kind confirmed under the act of 1851, and finally surveyed under the act of 1860, and was, in all respects, regular and in due form upon the face of the patent. On August 2, 1866, the Commissioner of the General Land Office transmitted said patent to the United States Surveyor General for California, to be delivered to the parties owning the grant. Immediately upon receiving notice of the issue of the patent, John B. Ward, then the owner of the grant, refused to accept it, on the ground that the survey was erroneous, and that there had been no legal notice given of the making and approval of the survey and plat, as required by the said act of Congress of 1860. He soon after presented to the Commissioner of the General Land Office a petition, with affidavits and other documentary evidence, tending to show that no legal notice of the survey, plats and approval thereof, had been given, and that the survey was erroneous, and asked that the patent might be recalled and a new survey had.

The Commissioner of the General Land Office, acting upon said petition and evidence, and thinking said survey and patent erroneous, on October 22, 1866, recalled the said patent, and directed a resurvey to be made by the surveyor general.

Thereupon a resurvey was made, and such proceedings were had that, on March 1, 1870, a second patent was duly made out, sealed with the seal of the General Land Office, signed by the President, recorded in the records of the General Land Office, and afterward transmitted by the commissioner to the surveyor general for California, to be delivered to the parties interested.

This patent was in the usual form issued in such cases, containing all the recitals of prior proceedings required by the acts of Congress, and was in all respects regular and in due form upon its face.

Afterward, and before said patent reached California, the Commissioner of the General Land Office telegraphed to the said surveyor general to return said patent to the General Land Office, and it was so returned, but without the knowledge or assent of the owners of said grant. Afterward, the Commissioner of the General Land Office, also without the assent of said owners, by

direction of the Secretary of the Interior, wrote across the face of said patent of March 1, 1870, the following words:

"Canceled. See decision dated June 12, 1872, of General Land Office, affirmed by the Honorable Secretary of the Interior, March 26, 1873.

"WILLIS DRUMMOND,
"*Commissioner General Land Office.*

"April 10, 1873."

Afterward, in June, 1873, the said patent, dated June 30, 1866, was again transmitted by the Commissioner of the General Land Office to the surveyor general for California, to be delivered to the owners of said grant, but the said parties have declined to take said patent, and they claim the said patent of date March 1, 1870, to be the only correct and valid patent.

The lands in question are not included in the patent of June 30, 1866, but are included in the patent of March 1, 1870, which last named patent embraces all the lands covered by the former, and other lands in addition. The plaintiff deraigns title from the original grantees of the said Gaudaloupe rancho through these proceedings, claiming under said patent of March 1, 1870. The defendants were, at the commencement of this action, in possession, claiming a pre-emption right in the lands, as being a part of the public domain of the United States.

W. H. Patterson and J. B. Felton for plaintiff.

Gray & Havens for defendants.

SAWYER, Circuit Judge, after stating the facts:

The patent of March 1, 1870, took effect from the moment it was signed by the President and passed the great seal. Certainly, from the time it was recorded in the proper record and despatched to the surveyor general for California, to be delivered to the claimants. A delivery in the case of a government patent is not necessary. The patentee takes by matter of record (*Lott* v. *Proudhomme*, 3 Rob. La. R., 293), which is directly in point.[1] (*Douner* v. *Palmer*, 31 Cal., 513; *Marbury* v. *Madison*, 1 Cranch, 137; *Green* v. *Leiter*, 8 Cr., 247; *Chipley* v. *Farris*, 45 Cal., 539; *Cunningham* v. *Browning*, 1 Bland, 299, 304, 308, 321; *Phillips' Lessee* v. *Irwin*, 1 Tenn., Overton, 235; *Lapeyre* v. *United States*, 17 Wall., 191.) But if something in the nature of a delivery were necessary, it has often been held that the recording of a deed

by the grantor, even without the knowledge of the grantee, is a constructive delivery. So the giving of it to a third party for the grantee, to be delivered to him, is a delivery. In *Marbury* v. *Madison*, the court say, upon the hypothesis that delivery is necessary, that "it is not necessary that delivery should be made personally to the grantee of the office. It never is so made. * * * If, then, the act of livery be necessary to give validity to the commission, it has been delivered, when executed and given to the secretary for the purpose of being sealed, recorded and transmitted to the party. But, in cases of all letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery is not one of them." (1 Cr., 159–60; see, also, 5 Barn. and Cress., 671; *Tibbals* v. *Jacobs*, 31 Conn., 428; *Stevens* v. *Hatch*, 6 Minn., 64; *Mitchell* v. *Ryan*, 3 Oh. St., 387; 4 Oh., 74; 19 Oh., 18; 8 Oh., 87.) The patent in this case was recorded in the proper records, and transmitted to the surveyor general for delivery to the owner of the rancho, and the acts mentioned herein were as effectual to pass the title as if the patent had been delivered by the Commissioner of the General Land Office to the patentee in person, and had been formally accepted by him.

An acceptance is presumed in such cases, unless the contrary appears. (See authorities last cited.)

If the title vested under the patent, the Commissioner of the General Land Office could not, of his own motion, divest it by canceling the patent or the record of the patent without the knowledge or consent of those interested. (*Lick* v. *Dias*, 30 Cal., 65; 37 Cal., 437.)

But it is insisted on the part of the defendants, that the issue of the patent of March 30, 1866, completed the proceeding in the case of the Guadaloupe rancho; that from that moment the Commissioner of the General Land Office was *functus officio*; that all his subsequent acts were necessarily void for want of power; and that the first patent is the only valid patent. This, to my mind, presents the most difficult question in the case.

If, for instance, the acts of Congress upon the subject had been wholly repealed pending the proceedings to confirm the Guadaloupe grant, and the land department had, nevertheless, gone on and completed the proceedings, and issued the patent in all respects, in the form in which it now appears, the patent would, doubtless, have been void for want of any authority to complete the proceed-

ing, and issue the patent. All jurisdiction would have been withdrawn. The patent, although in the semblance of a record in such cases, would really be no public record, for the want of jurisdiction in the officer to make it. And this want of power would be an available defense to an action to recover lands depending on the patent.

So, if the issue of the first patent, as found in this case, did fully complete the proceeding for the confirmation of that grant, and absolutely vest the title in the confirmees, willing or unwilling; if thereby the power of the Commissioner of the General Land Office under the statute, had been fully exhausted with respect to that specific grant, without authority under any circumstances, to reopen the case, all subsequent proceedings, I think, must be void for want of power; and this want of power is a good defense to the action.

Such, I also think, would have been the result had the parties holding the grant acquiesced in the action of the land office, and accepted the patent; but they did not acquiesce or accept it. On the contrary, the patent was at once repudiated when brought to their knowledge, and an application promptly made to have it recalled on the ground that proper notice of the approval of the survey and plat had not been given as required by the statute, and that the survey was erroneous.

In the case of an old grant in Missouri, in *Maguire* v. *Tyler*, the Supreme Court held, that "where a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the Secretary of the Interior may recall it." (8 Wall., 651, 663; so, also, 1 Black, 199.)

In that case it appeared that the grant had been improperly located. But the power to recall the patent after it has been issued with the consent of the patentee, when it does not cover the land to which the latter is entitled, necessarily involves the power to examine and determine whether the grant has been properly located. If the Commissioner of the General Land Office has the power to act at all in such a case, that ends the question, for that constitutes jurisdiction.

Jurisdiction has often been defined by the Supreme Court to be "the power to hear and determine." (*Grignon's Lessee* v. *Astor et al.*, 2 How., 338.)

And again: "The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, but

upon the right to hear and decide at all." (*Ex parte Watkins*, 7 Pet., 572; see, also, 6 Pet., 709; 12 Pet., 718; 3 Pet., 205; 12 Pet., 633; *In re Bogart*, *ante*.)

The same definition applies to other officers entrusted with powers as well as to courts.

In the case of *Maguire* v. *Tyler*, the proceedings were fully completed, and the patent issued. There was no mere clerical error, or excess of jurisdiction. Just such a patent was issued, and in such a case, and to such a party as was contemplated. It was simply erroneous. An error occurred in the course of the proceeding in the due exercise of jurisdiction as distinguished from a case of want of jurisdiction. The officers of the government misjudged, and determined that he was entitled to the wrong land.

Yet, upon the refusal of the patentees to accept the patent, and upon their application it was recalled. The Supreme Court twice determined that it was properly done. I can perceive no distinction between that case and this.

The present case is, in all essential respects, similar. The Commissioner of the General Land Office, acting upon the certificate of the surveyor general, issued a patent. Immediately the parties in interest refused to accept it, and made a showing which, at the time, satisfied the Commissioner of the General Land Office that the statutory notice had not been given, and that the land was not properly located. If there was, in fact, any error, it was an error in the exercise of jurisdiction—in the determination of the question of fact—like that in the cases cited.

He recalled the patent, and other proceedings were had, which ran through a period of nearly four years, embracing a new survey, approval, etc., and resulted in a new patent in accordance with the last survey. Now, if the Commissioner of the General Land Office was *functus officio* on the issue of the first patent, he must have been so on the issue of the patent in question in *Maguire* v. *Tyler*, for at the time of the recall, both cases were essentially alike.

It is true that, under the fifth section of the act of 1868, the survey, under the circumstances prescribed, becomes final, and has all the force and effect of a patent. But it has no greater force than the patent. The patent is the formal, final, and authentic record. If the patent itself can be recalled and corrected upon the application of the patentee, when erroneous, the

survey, which is of no greater force, can be corrected by the same authority. Besides, one of the very questions for the commissioner of the land office to determine on the application to recall the patent and correct the survey was, whether all the acts necessary to make the survey final, had been in fact performed.

The certificate of the surveyor general, upon which he acted in issuing the patent was, doubtless, *prima facie* evidence, which, in the absence of anything to the contrary, justified him in its issue. But it was not necessarily conclusive. The statute does not so provide. On the application to recall the patent, other evidence was offered tending strongly to show that the certificate of the surveyor general, as to a legal publication, was erroneous in point of fact, and the survey erroneous.

The case of *Maguire* v. *Tyler* settles the question that the power exists to recall a patent which the patentee declines to accept, on the ground that it was erroneously issued upon the application and with the consent of the patentee, when there is found to be error; and as a predicate for such action, necessarily, the power remains to determine the question whether such error exists as will justify a recall. And it seems to me to cover this case.

The jurisdiction then had not been wholly exhausted by the issue of the patent: and, as before said, if there was still left power to recall a patent merely erroneously issued, the authority remained to inquire and determine whether it was erroneously issued. There might be error in that determination, but it would be an error in the exercise of jurisdiction in determining whether there had been a legal notice or a proper survey, and not an act performed without jurisdiction. And such error cannot be reviewed in this court in this kind of action. The patent having been recalled in the exercise of a lawful power, the case stood as if it never had issued, and the subsequent proceedings are all regular and in due form. The patent of 1870 is regular upon its face, and, according to the recitals, issued in a case fully authorized by law. If it is to be defeated, it is by matter *de hors* the patent, and upon the grounds either of error, mistake, or fraud in some part of the proceedings resulting in the patent, and not from want of power to act upon a proper showing in any of the necessary steps taken.

The patent itself is a solemn record of the government, and not subject to be impeached collaterally from without in an action at law in the national courts. It is so regarded upon principles

of public policy resting upon the same grounds that forbid a collateral impeachment of a judgment of a court of competent jurisdiction, valid upon its face, whatever errors or fraudulent practices may have intervened in the proceedings upon which it was obtained. In *Doll* v. *Meader*, 16 Cal., 325, Mr. Chief Justice Field well says:

"If the authority to issue the patent depend upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases the parties without title cannot be heard, and the parties with subsequent title must seek their remedy by *scire facias* or bill, or information to revoke the first patent or limit its operation." And Mr. Justice Grier, in *United States* v. *Stone*, 2 Wall., 535, says: "A patent is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy."

Upon these principles no error, if any there is, of the Commissioner of the General Land Office in determining the question whether there was a proper ground for recalling the first patent, and in recalling it is subject to review in this case. If there is any ground of mistake, fraud or otherwise, which would justify the repeal or annulling of the patent of 1870, that object must be accomplished in some direct proceeding in the proper court taken for that purpose against the patent.

An equitable defense to an action at law is not available in this court, and in this action the patent is conclusive. The difference between the first and last patent is this: The last was promptly acquiesced in and accepted, while the first was rejected by the interested parties, and the patent recalled on their application on a showing to the satisfaction of the commissioner of error. The contest between the parties in the same proceeding had not yet ended. There was a reopening of the proceeding for further hearing before acceptance, and with the consent of

both parties. I desire it to be understood that I have not considered the effect of a refusal of the claimant to accept a patent issued in this class of cases in any other aspect than as bearing upon the question of power to recall a patent and re-examine the survey, with his assent and upon his application.

The defendants, as authority for cancelling the last patent, cite *Bell* v. *Hearne*, 19 How., 262, and *Doswell* v. *De La Lanza*, 20 How., 29.

But these cases are not like the present. They depend upon different principles.

In the last case *John* Bell had purchased the land and got his certificate of purchase. By a clerical error in the land office the name of *James* Bell was returned and the patent made out in his name, but delivered to *John* Bell, the true party. He returned it and had a new patent issued in the proper name. *John* Bell was the purchaser. He was the one to whom it was intended to patent the land. The patent was delivered to him. There was no purchase by *James* Bell and no proceedings by him, or in his name, upon which to base a patent other than that which by a clerical error accidently crept into the return to the General Land Office. There was no error in judgment in determining a matter in the progress of the proceeding, for there was no proceeding at all by the nominal patentee. It was like commencing and prosecuting an action against *John* Bell till coming to the verdict, which is accidentally returned and judgment thereon rendered in the name of *James* Bell, who has never been a party to, or appeared in the action. Besides, as in the case of *Maguire* v. *Tyler*, the patent was returned by and corrected with the assent and at the request of the real party in interest. The other case is similar only it does not appear, except by implication, at whose request the patent issued in the name of the wrong party was canceled. In both of these cases there were no proceedings by purchase or otherwise anterior to the issuing of the patents upon which to base them—nothing upon which the commissioner was authorized to act in these cases: nothing to call the jurisdiction of the land office into action at all in respect to the nominal patentees. The patents were never intended for them.

There must be judgment for the plaintiff with costs, and it is so ordered.

NOTE.—1. Held the same in *Watterson* v. *Bennett*, 18 La. Ann., 250. Neither can the President annul and set aside the approval of his

predecessor, of the sale made by an Indian reservee of his land. *Godfrey* v. *Beardsley*, 2 McLean, 412.

An exemplification of a patent under the seal of the land office, is admissible as evidence, without proof of the loss or destruction of the patent. *Patterson* v. *Winn*, 5 Pet., 233.

THEODORE LE ROY *v.* TOBIAS B. JAMISON ET AL.

Circuit Court, District of California, June, 1875.—3 Sawyer, 369.

1. *Authority of Commissioner of the General Land Office.*—Previous to the act of June 14, 1860, vesting jurisdiction in the District Court of the United States for California, over surveys of confirmed Mexican land claims, the Commissioner of the General Land Office exercised a general supervision and control of all executive duties relating to private claims to land, and the issuing of patents therefor.

   Such authority was vested in him by the act of July 4, 1836, reorganizing the General Land Office. It embraced the examination of all surveys of such private claims, and their correction until made conformable with the right conferred upon the claimant, by legislative act or judicial decree. This authority continues under the act of 1864. By the act of 1860, and so long as that act was in force, his power in this respect was withdrawn. That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing patents thereon. The course of procedure in such cases stated.
2. *Final survey of Mexican land grant; Publication of notice.*—To render a survey final under the act of 1860, when not submitted to the district court, it was necessary that the publication required should be made, and though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him, to see that the necessary publication had been made. The certificate of the surveyor-general was only *prima facie* evidence of the fact.
3. "*Place of publication defined.*"—By the language: "*place of publication*" in the statute of 1860, requiring the surveyor-general to give notices of surveys made by him by publication once a week for four weeks in two newspapers, one of which was to be in a paper where the "place of publication" was nearest to the land, reference is had to the place where the paper is first issued; that is given to the public for circulation, and not to the place where the paper is subsequently distributed.
4. *Notice; what it must state.*—A notice published by the surveyor-general that he had examined and approved, under the act of 1860, of a particular rancho confirmed to designated parties, is not a compliance

with the law requiring publication of notice, that he had caused a survey and plat to be made of———land confirmed; or had approved of one made by others under his direction.

5. *Clerk's certificate; Of what evidence.*—The clerk of the United States District Court can certify to copies of papers and orders in his office also, perhaps, to the absence of papers and orders in particular cases. His certificate is not evidence of any other facts stated therein.

6. *Commissioner's decision; Effect of.*—The determination of the commissioner, upon receiving a survey transmitted to him as published under the act of 1860, as to the regularity and sufficiency of the alleged publication is conclusive, unless reviewed and corrected on appeal by the Secretary of the Interior. The right of the commissioner, upon proper application to reconsider any matter previously determined by him, must be exercised before proceedings upon the original ruling have been taken and concluded.

7. *Acceptance of patent.*—No one can be compelled by the government to become a purchaser, or even to take a gift. In order that the patent of the government may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him it is essential that it should be accepted. The acceptance by the grantee of the conveyance, where no personal obligation is imposed, will always be presumed in the absence of expressed dissent, whenever the conveyance is placed in a condition for acceptance.

8. *Patent, when in condition for acceptance.*—The deed of the government that is its patent, is in a condition for acceptance, when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. The record stands in the place of the offer or delivery in the case of a private deed; the instrument is thenceforth held for the grantee.

9. *Officers' powers cease with record of the patent.*—With the record of the patent the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office, or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

10. *When prior application for patent, evidence of acceptance.*—A previous application for a patent, is evidence of its acceptance if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851, and when a patent is issued in conformity with proceedings regularly taken under the act, it takes effect without reference to any subsequent action of the patentee. But, if the patent be issued without

a final survey conformable to the decree, its acceptance cannot be conclusively presumed from the fact, that the patentee instituted the proceedings for the confirmation of his claim. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the surveys, as to the errors alleged.

11. *Acceptance of patent waiver of objections.*—Objections by the patentee to the survey of a confirmed Mexican land claim, are waived by his acceptance of the patent.

Before MR. JUSTICE FIELD:

This was an action to recover the possession of certain real property in the county of Santa Barbara, and by stipulation was tried by the court without the intervention of a jury. Both parties claimed the demanded premises under patents of the United States, issued upon the confirmation of grants of the former Mexican government. Both patents covered the demanded premises. The patent under which the plaintiff claimed, bears date in March, 1870, and the grant upon which it is founded was made in March, 1840. The patent under which the defendants claimed, bears date in October, 1873, and the grant upon which it rests was issued in December, 1844. The plaintiff having the earlier patent and the elder grant was entitled to recover, unless the validity of the patent or the correctness of the survey of the premises covered by it was successfully assailed. The defendants contended that the patent was invalid and that the survey was incorrect.

In support of their position that the patent was invalid they produced the opinion and decision of Commissioner Drummond, of the General Land Office, made in June, 1872, directing a cancellation of the patent, and the decision of the Secretary of the Interior affirming his action. The following is Commissioner Drummond's opinion:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June* 12, 1872.

"SIR: I have carefully examined the papers in the case of the rancho Guadalupe, Diego Olivera and Teodore Arellanes, confirmees, granted by Juan B. Alvarado, March 21, 1840, confirmed by the board of land commissioners for California, December 6, 1853, and by the United States district court, September 25, 1855, and appeal dismissed February 5, 1857.

"Under instructions, dated January 15, 1858, from J. W.

Mandeville, United States surveyor general for California, United States deputy surveyor Brice M. Henry, made a survey of this rancho; but a protest against said survey having been filed July 6, 1859, by Diego Olivera, it was set aside and a resurvey ordered, which resurvey, containing 32,408.03 acres, was made in September, 1860, by United States deputy surveyor J. E. Terrell, and the survey and plat approved by Surveyor General Mandeville on the twenty-ninth of January, 1861. This survey was, on the thirty-first of May, 1861, certified by said surveyor general to have been published for four successive weeks in the Santa Barbara *Gazette*, the first publication being on the fourteenth of February, 1861, and the last on the seventh of March, 1861; and also in the Los Angeles *Star*, the first publication being on the twenty-third of February, 1861, and the last on the sixteenth of March of the same year, the form of said publication being as follows, as shown by a copy certified, in 1870, by United States surveyor general Sherman Day:

"UNITED STATES SURVEYOR GENERAL'S OFFICE,
"SAN FRANCISCO, *February* 12, 1861.

"In compliance with the first section of an act of Congress approved June 14, 1860, regulating surveys of private land claims, surveyed in pursuance of the thirteenth section of an act entitled 'An act to ascertain and settle private land claims in the State of California,' approved March 3, 1851, have been examined and approved by me.

"Name of rancho, Guadalupe.

"Confirmee, Diego Olivera *et al.*

* * * * * *

"The plats will be retained in this office subject to inspection for four weeks from the date of this publication.

"JAMES W. MANDEVILLE,
"*United States Surveyor General.*"

"On the twenty-third of May, 1863, John W. Wheeler, clerk of the United States district court for the southern district of California, certified 'that due notice by publication, in manner and form as required by law, has been made by the surveyor general of the United States for the State of California, in the matter of the approved survey of the lands called, "Guadalupe," confirmed to the claimant in the above-entitled cause of *Diego Olivera et al.* v. *The United States*, and 'that the full period

of six months from and after the completion of said publication has elapsed, and no objections having been made thereto or filed in my office, the said approved survey has become final and the claimant therefore entitled to a patent for the land therein contained.' In the same year E. F. Beale, then United States surveyor general for California, transmitted to this office a copy, duly certified, May 25, 1863, of the plat, field notes, and other documents in the case as a basis for the issue of a patent, and in those papers the surveyor general, after stating that the rancho under consideration had been surveyed in conformity with the grant and decree of confirmation, continues as follows:

'I do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by J. E. Terrell, deputy surveyor, in the month of September, 1860, under the direction of this office, which, having been examined and approved, are now on file therein.

'And I do further certify that in accordance with the provisions of the act of Congress, approved on the fourteenth day of June, 1860, entitled 'An act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims,' I have caused to be published once a week, for four weeks successively, in two newspapers, to wit, the Santa Barbara *Gazette*, published in the county of Santa Barbara, being the newspaper published nearest to where the said claim is located, the first publication being on the fourteenth day of February, 1861, and the last on the seventeenth day of March, 1861; also, in the Los Angeles *Star*, a newspaper published in the city and county of Los Angeles, the first publication being on the twenty-third day of February, 1861, and the last on the sixteenth day of March, 1861, a notice that the said claim had been surveyed and a plat made thereof and approved by me. And I do further certify that the said approved plat and survey was retained in this office during all of said four weeks, and until the expiration thereof, subject to inspection. And I do further certify that no order for the return thereof to the United States district court has been served upon me. And I do further certify that, under and by virtue of the said confirmation, survey, decree, and publication, the said Diego Olivera *et al.* are entitled to a patent from the United States upon the presentation thereof to the General Land Office for the said tract of land, bounded and described as fol-

lows, to wit.' (Here follow the field notes of the Terrell survey.)

"It appears from the foregoing that the rancho Guadalupe was properly and finally confirmed, and that it was surveyed by Henry, objected to, and resurveyed by Terrell in September, 1860.

"Surveyors General Mandeville and Beale certified that the plat and field notes thereof were approved in January, 1861, and duly published, according to law, in the months of February and March of the same year in the Santa Barbara *Gazette* and the Los Angeles *Star;* and the clerk of the United States District Court for Southern California certifies, in his official capacity, that all the requisites of the law had been complied with, and that the survey of the rancho Guadalupe was final by publication under the act of 1860.

"So far, therefore, as the official records of the surveyor general's office and courts show, the survey was final. It was so considered by this office, and a patent in accordance therewith, dated June 30, 1866, was prepared, signed, and recorded, and sent to the United States surveyor general for California on the second of August, 1866; but said patent was never delivered, the then owner of the rancho, John B. Ward, refusing to accept the same, alleging that the Terrell survey did not conform to the decree of confirmation, and also that it was not final under the act of June 14, 1860 (12 Stat., p. 33), the requirements of that act with respect to publication never having been complied with. In this protest Mr. Ward alleges 'that on the twenty-ninth day of January, 1861, the said surveyor general filed in his said office an approval of the field notes and plat of the said rancho, and that subsequently to such filing no publication of the notice of the approval was made in accordance with the provisions of the act of Congress of June 14, 1860, already recited.' 'That it is true that a notice of the approval of a plat of survey of a certain tract of land, known by the name of Guadalupe, was published in the Los Angeles *Star*, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the *Pacific Sentinel* the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860; but the field notes and plat of the rancho, which is the subject of the present memorial, not having been approved until the twenty-ninth of January, 1861, the publication above referred to could have had no application thereto, so that, in point of fact, no publi-

cation of the approval by the surveyor general of the field notes and plat of the survey of the Guadalupe rancho, granted to Diego Olivera and Teodore Arellanes, has ever been made according to law.'

"In support of these allegations, there were filed three affidavits:

"First. An affidavit signed by John Nugent, one of Mr. Ward's counsel, in which it is stated that up to July, 1866, no other plat of the Guadalupe was ever exhibited or on file as the official plat approved by J. W. Mandeville, except one with the following inscription:

'NOTE.—A notice of the approval of this plat of survey has been published in accordance with the act of Congress of June 15, 1860, in the Los Angeles *Star*, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the paper nearest the land, being the *Pacific Sentinel*, the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860. This plat has remained in this office subject to inspection from the date of the approval thereof.'

"Second. An affidavit signed by Vicente A. Torras, who was employed on the Santa Barbara *Gazette* in January and February, 1861, and who swears that in those months said paper was published in San Francisco.

"Third. An affidavit signed by S. B. Brinkerhoff, in which it is stated that said affiant 'was a subscriber to a paper known as the Santa Barbara *Gazette*, and that of his own knowledge the place of publication of said paper was in the city of San Francisco, and not in the county of Santa Barbara.'

"Upon these affidavits this office decided, in letter dated October, 22 1866, addressed to the United States surveyor general for California, that the publication was not in conformity with the law of 1860, and was, therefore, void. A new survey was ordered, made, and subsequently published under the act of 1864, approved by the Commissioner of the General Land Office, and patent issued in accordance therewith, which patent was sent to the surveyor general's office, but recalled before delivery.

"Although two witnesses, Torras and Brinkerhoff, swear positively that the Santa Barbara *Gazette* was, in February and March, 1861, published in San Francisco, Dona Longina Yriarte de Torras, widow of V. I. Torras, one of the publishers in 1861, of the Santa Barbara *Gazette*, swears that from January 1 to October 17, 1861,

said paper was printed at San Francisco, and as soon as printed sent to Santa Barbara for distribution; and M. W. Kimberly testified that during the years 1860 and 1861, there was no paper published in Santa Barbara county, except the Santa Barbara *Gazette*.

"There is also filed with these affidavits a copy of said paper, headed as follows: 'Santa Barbara *Gazette*. Organo de la Poblacion Espanola en California. Santa Barbara, Jueves, 17 de Octubre de 1861.' It would seem, therefore, that said paper was printed at San Francisco, but distributed at Santa Barbara, and that Torras and Brinkerhoff must be understood as testifying in effect that in their opinion the place of printing and publication must be identical. With their conclusions, which seem to have materially affected the opinion of this office when the publication of the Terrell survey was rejected, I cannot agree. The paper on its face purports to be published at Santa Barbara, and it was first circulated in that county, and in my opinion, a decision from these facts that said paper was published at San Francisco cannot be reached by an intrepretation of the word 'published' in accordance with its usual and ordinary meaning, nor in accordance with the proper interpretation of the word, as used in the act of June 14, 1860. The design of the publication prescribed by the act of 1860, was to convey to parties in interest, notice that their claims had been surveyed, and to afford them an opportunity to file objections and contest said surveys; and that object was as well, if not better, accomplished by a publication in the manner stated than it could have been in any other manner under the peculiar circumstances surrounding the case. That would be sufficient to satisfy the requirements of the spirit of the law, but in my opinion the proceedings in the matter were also in strict conformity with the letter of the act of 1860.

"In Worcester's Dictionary, 'publication' is defined as 'the act of publishing or making public,' etc.; in Webster's Dictionary, the same word is defined as 'the act of publishing or making known notification to the people at large, either by words, writing, or printing;' in Bouvier's Law Dictionary, 'publication' is defined as 'the act by which a thing is made public,' and 'publisher' as 'one who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers;' and the same authority defines, 'printing' as 'the art of impressing letters; the art of making books or papers by impres-

sing legible characters.' Many other authorities might be added, but these are considered sufficient to show the marked difference between the generally recognized meaning of the words 'published' and 'printed,' and sufficient also to show that the publication in the case under consideration was properly made under the law; for while it is admitted that the Santa Barbara *Gazette* was printed at San Francisco, it is clearly shown that said paper was first 'made public to the people at large' (i. e. published) in the county of Santa Barbara.

"The remaining objections as heretofore stated, to the publication of the Terrell survey, are that said publication was not made in February and March, 1861, in the Los Angeles *Star* and Santa Barbara *Gazette*, as certified by the surveyor general, but that the publication was made in September and October, 1860, in the Los Angeles *Star* and *Pacific Sentinel*, which publication was prior to the date when the plat and field notes of said survey were approved, on the twenty-ninth day of January, 1861. In support of these allegations there is no evidence, except the affidavit of Mr. Ward, then owner of the rancho, and of John Nugent, one of Mr. Ward's counsel in the case.

"The first named does not positively admit that the survey of the Guadalupe, Diego Olivera et al., confirmees, was ever published, though he says a certain rancho, called Guadalupe, was published, but Mr. Nugent, in effect, swears that as late as July, 1866, no plat and field notes of the rancho under consideration were ever 'exhibited as the official plat and field notes approved by Surveyor General Mandeville, but one which had on its face a note showing said publication to have been made in September and October, 1860, in the Los Angles *Star* and the *Pacific Sentinel*, and also showing the approval of said plat and field notes to have been made in January, 1861.

"By this showing it would seem that, even admitting the facts set forth by the ranch owner and his attorney, the Guadalupe survey was final by publication so far as these objections are concerned, as the Honorable Secretary of the Interior, in the case of the rancho Tajauta, decided on the twenty-first of February, 1872, that a publication by the surveyor general that a certain survey had been approved, was in itself a sufficient approval prior to publication to satisfy the requirements of the act of fourteenth of June, 1860, notwithstanding the plat bore upon its face an approval subsequent to said publication. But I am not satisfied

of the correctness of the facts stated in said affidavits, for the record evidence of the surveyor general's office and the district court, contradicts said affidavits in every important particular: and let it be once established that testimony, without cross-examination, of two interested witnesses shall be sufficient to overturn the certificates of three sworn officials of the government, two surveyors general and the clerk of a United States district court having jurisdiction in the matter, and the surveys of the numerous ranchos considered final by publication are no longer fixed upon that firm basis contemplated by the law. Nothing but the most clear and positive evidence ought to be admitted to set aside such a record, particularly when, as in this case, it was acquiesced in by the parties in interest, at the date when it was made, and for years thereafter.

"That the Guadalupe rancho, Diego Olivera *et al.*, confirmees, was published in the Los Angeles *Star* and the *Pacific Sentinel* in SEPTEMBER and OCTOBER, 1860, is, in my opinion, not proven: neither is the insinuation in Mr. Ward's protest, that said rancho might have been mistaken for some other rancho Gaudalupe, entitled to any weight, for there is but one rancho of that name confirmed to Diego Olivera *et al.* in the State of California.

"A careful examination of the papers in the case upon which this office rejected the Terrell survey, and also the papers filed subsequent to such rejection, leads me to the conclusion that such action was erroneous, and that said survey was properly approved on the twenty-ninth of January, 1861, and published in the months of February and March of the same year in the Los Angeles *Star* and the Santa Barbara *Gazette*, and no objections thereto having been made within the time allowed by law, it became final by publication under the provisions of the act of Congress approved June 14, 1860. (12 Stats., p. 33.) The patent executed in June, 1866, was, therefore, correctly executed, and is a good and valid patent for the rancho aforesaid, and is herewith transmited for delivery to the party or parties properly entitled thereto, said patent having been legally executed, the subsequent patent was without authority of law, and, therefore, void *ab initio*, and, being now in the possession of this office, will be canceled.

"You will give notice of this decision to all parties in interest, allowing sixty days from date of notice for appeal to the Honorable Secretary of the Interior, at the expiration of which time, if appeal be taken, you will forward all the papers in the case, as

in other cases of appeal, and if no appeal be taken, you will so notify this office.

"Very respectfully,

"WILLIS DRUMMOND,

"*Commissioner.*"

They also produced an indorsement of that commissioner upon the patent, declaring its cancellation. It is as follows: "Canceled, see decision dated June 12, 1872, of General Land Office, affirmed by the Honorable Secretary of the Interior, March 26, 1873. Willis Drummond, Commissioner General Land Office, April 10, 1873." (For other facts, see *Le Roy* v. *Clayton*, 2 Sawyer, 495.)

Subsequently, on the twenty-third of the same month, this cancellation was revoked by order of the Secretary of the Interior, and the revocation is also indorsed upon the patent. The secretary states, in his communication to the commissioner, that the revocation was directed to enable the claimant to appear in court, and correct what he asserts to have been an error committed against his rights, and not for the purpose of revoking or altering the decision made.

In connection with these documents, which were admitted subject to the objection of the plaintiff, the defendants produced another patent to the same parties, issued in June, 1866, which is referred to in the decision of Commissioner Drummond, and this patent, they contend, was the only valid patent which could be issued of the premises confirmed under the Mexican grant to Olivera and Arellanes, from whom the plaintiff deraigns his title.

That grant was of a rancho or tract of land known by the name of Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by the board in 1853, and by the decree of the district court of the United States in 1857. This decree became final by stipulation of the Attorney General, abandoning an appeal taken from it to the Supreme Court of the United States.

In September, 1860, the claim thus confirmed was surveyed under instructions of the surveyor general for California by his deputy, Terrell, and the survey and plat of the premises were approved by him on the twenty-ninth of January, 1861. On the thirty-first of May following, that officer filed in his office a certificate to the effect that the rancho confirmed had been surveyed, and that the survey and plat were approved by him on the day

mentioned: that he had, during the previous February and March, caused to be published once a week for four week successively, in two newspapers, to wit, theSanta Barbara *Gazette*, published in the county of Santa Barbara, and the Los Angeles *Star*, published in the city and county of Los Angeles, a notice that the land had been thus surveyed, and that the survey and plat had been approved by him; that the survey and plat were retained in his office during the four weeks, subject to inspection, and that no order for their return to the United States District Court had been served upon him. At the time the survey and plat thus mentioned were made and this certificate was filed, J. W. Mandeville, Esq., was the surveyor general of California. On the twenty-fifth of May, 1863, nearly two years after this paper was filed, Edward F. Beale, Esq., who was the successor in office, as surveyor general, of Mandeville, transmitted to the Commissioner of the General Land Office at Washington, a copy of the plat of the tract surveyed, with the certificate contained in the above opinion of Commissioner Drummond, that he had caused the publication of notice that the survey of the tract had been made in the Santa Barbara *Gazette* and Los Angeles *Star*, as stated in the certificate of his predecessor. The new surveyor general evidently copied the language of his predecessor, and inadvertently ascribed to himself an act which could only have been done by that officer.

Upon the transcript of the proceedings for the confirmation of the claim and this certificate of Surveyor General Beale, a patent was issued from the General Land Office to the confirmees of the grant on the thirtieth of June, 1866, signed by the President, under the seal of the United States, and recorded in the proper records of the land office. This patent was, in August, 1866, transmitted to the surveyor general of California, to be delivered to the parties entitled to its possession. Immediately upon receiving notice of its issue, John B. Ward, at the time the owner of the premises and entitled to the patent, refused to accept it, alleging that the survey of the premises did not conform to the decree of confirmation, and was not final under the act of 1860, as the requirements of that act with respect to publication had not been complied with. Soon afterwards he presented to Commissioner Wilson, of the General Land Office, certain documentary evidence to establish his allegations, accompanied with a petition, that the patent might be recalled and a new survey ordered.

That evidence showed that the Santa Barbara *Gazette*, in which publication was made, was printed and published in the city of San Francisco, and not in the county of Santa Barbara. The evidence at least satisfied the commissioner that the publication was not made in conformity with the law of 1860, and also that the survey was erroneous. The patent of 1866 was accordingly recalled by him and a new survey ordered, under the act of 1864. Such survey was made in 1867 and duly advertised, and was forwarded by the surveyor general, with his approval, to the commissioner. Upon this survey a new patent was, on the eighteenth of March, 1870, issued to the same parties as the original patent, signed by the President, under the seal of the United States, and recorded in the proper records of the land office. This patent was then forwarded by the commissioner by mail to the surveyor general of California for delivery to the party entitled to its possession. Some days afterwards, and before its arrival in California, the commissioner telegraphed to the surveyor general to return the patent, and it was accordingly returned. Two years afterwards, in June, 1872, Commissioner Drummond, the successor of Commissioner Wilson, reviewed the latter's action, had in 1866, in directing the new survey and his subsequent action in issuing a new patent, and, as shown by his decision above given, held that such action was without authority and void; that the Terrell survey of 1861 was conclusive, and accordingly directed a cancellation of the second patent, and in its place a delivery to the patentees of the recalled patent of 1866.

Evidence was also given as to the boundary line dividing the grants upon which the two patents were issued, which is sufficiently stated in the opinion of the court.

The case was held under advisement for some weeks, when judgment was rendered in favor of the plaintiff.

John B. Felton & *Wm. H. Patterson* for the plaintiff.

Gray & *Haven*, *D. M. Delmas and S. F. Lieb* for defendants.

MR. JUSTICE FIELD:

If the facts stated in the opinion of Commissioner Drummond annexed to the patent of 1870, cannot be considered as facts in evidence, there is nothing before the court impairing the validity of that patent. The indorsements on the copy produced, show a revocation by the secretary of the cancellation directed by the commissioner; and if titles can be affected in this irregular way,

can be divested and reinvested by indorsement of the officers of the land office upon its records, the revocation is of equal validity with the cancellation. The case, as thus presented, would be that of two patents to the same parties, the second covering a larger tract than the first, with the admission of counsel that the second was issued upon allegations by the owner of error in the survey of the premises covered by the first, and of its insufficient publication under the act of 1860.

Without other knowledge on the subject, we could not say that the second patent was invalid. Cases may often occur where a second patent would be necessary to prevent gross wrong to the patentee. If, for instance, a confirmation and a survey embraced three distinct tracts, and by mistake the survey returned and the patent issued covered only two of them, we do not see why, upon a proper presentation of the fact, and application of the claimant, the commissioner might not issue a second patent, either for the omitted tract or one embracing the three tracts together.

The administration of the land department would be very defective if a mistake of this kind could not be remedied upon the consent of the parties, before the acceptance of the patent had rendered the proceeding a closed transaction.

If, then, any consideration is to be given to the argument of counsel, that the second patent in the case was properly canceled because the first patent was conclusive of the rights of the parties, the facts stated in that opinion must be treated as in evidence: they were apparently so regarded by counsel on the argument, and for the present we shall so treat them.

We are therefore required, for the disposition of the case, to consider the validity of the action of the two Commissioners of the General Land Office—that of Wilson, in canceling the patent of 1866, and issuing the one of 1870, and that of Drummond, in annulling the action of Wilson, and directing cancellation of the patent of 1870.

Previous to the act of June 14, 1860, the Commissioner of the General Land Office exercised a general supervision and control of all executive duties relating to private claims to land, and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836, reorganizing the General Land Office. It necessarily embraced the examination of all surveys of such private claims, and their correction, until made conformable with the right conferred upon the claimant by legislative act or judicial

decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control. He was invested with this necessary power to prevent the consequences to individuals as well as to the public, of accident, inadvertence, irregularity, or fraud. (*Castro* v. *Hendricks*, 23 How., 443.) His duty in these cases were to compel conformity in the survey made with the decree of confirmation, where that contained a description of the land sufficiently specific to guide the surveyor, but if it contained no such description, then to compel a survey in a compact form, so far as such compactness was consistent with the natural features of the country, and the previous selection of the confirmee, as shown by his residence, cultivation and sales.

This authority of the commissioner continues under the act of 1864. But by the act of 1860, and so long as that act was in force, his power in this respect was withdrawn. That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing a patent thereon.

It provided that the surveyor general, when he had caused, in compliance with the thirteenth section of the act of 1851, a private land claim to be surveyed, and a plat thereof to be made, should give notice that the same had been done, and that the plat and survey were approved by him, by publication once a week for four weeks in two newspapers, one of which was to be in a paper "where the place of publication was nearest to the land," and the other in a paper published in San Francisco, if the land was situated in the northern district of California, and in Los Angeles, if situated in the southern district.

The act also provided that, until the expiration of the publication, the survey and plat should be retained in the surveyor general's office subject to inspection: that upon the application of any party whom the district court or a judge thereof should deem to have such an interest in the survey and location of a land claim, as to make it just and proper that he should be allowed to intervene for its protection, or on motion of the United States, the district court should order the survey and plat to be returned into court for examination and adjudication; that when thus returned notice should be given by public advertisement, or in some other form prescribed by rule, to all parties interested, that objection

had been made to the survey and location, and admonishing them to intervene for the protection of their interests; that such parties having intervened might take testimony and contest the survey and location, and that on hearing the allegations and proofs, the court should render its judgment approving the survey, if found to be accurate, or correcting or modifying it, or annulling it and ordering a new survey, if found to be erroneous, and generally to exercise control over the survey until it was made to conform to the decree of confirmation.

And the act then declared that when after publication, as thus required, no application was made for an order to return the survey into court, or the application was refused, or if granted the court had approved the survey and location, or reformed or modified it and determined the true location of the claim, it should be the duty of the surveyor general to transmit, without delay, the plat or survey of the claim to the General Land Office; and that the patent for the land, as surveyed, should *forthwith* be issued therefor; and that "the plat and survey so finally determined by publication, order, or decree," as the same might be, should "have the same effect and validity in law, as if a patent for said land so surveyed had been issued by the United States." It is plain, from this language, that it was the intention of Congress to withdraw from the commissioner the supervision and control of surveys subsequently made of private land claims under Mexican grants in California.

But there was still a duty resting upon that officer. To render the survey final, when not subjected to the judgment of the district court (which acquired jurisdiction by a return to it of the survey), it was necessary under the act, as already seen, that the publication required should be made. This was an essential prerequisite to its finality: nothing else could be substituted for it. And though, in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made.

The certificate of the surveyor general was evidence of this fact, but it was only *prima facie* evidence; unquestioned, it might be taken as conclusive; when questioned, the commissioner could go behind it. The documents presented to him disclosed the fact that no publication of notice of the Terrell survey had been made in a paper published nearest the land. They allege that the Santa

Barbara *Gazette* was, in January and February, 1861, published in the city of San Francisco, and not in the county of Santa Barbara, which is distant several hundred miles from that city. Of these documents one was an affidavit made by a person employed upon the *Gazette*, and the other by a subscriber to the paper. Both of them were made upon personal knowledge, and were positive in their character.

And yet an affidavit of the widow of one of the publishers of the paper, made four years afterwards, that the Santa Barbara *Gazette*, though printed in San Francisco between January and October, 1861, was sent as soon as printed to Santa Barbara for distribution, was considered by Commissioner Drummond six years afterwards sufficient to overthrow these allegations. This distribution constituted, according to his judgment in reversing the action of his predecessor, the publication of the paper in that county within the meaning of the act of Congress.

Assuming for the present that Commissioner Drummond possessed at the time authority to annul the action of his predecessor if deemed erroneous, we do not agree with him in his conclusion as to the sufficiency of the publication. It was not alleged in the affidavit of the widow, and it could not be presumed from the mere heading of the paper, admitted to be printed elsewhere, that the entire issue was sent to Santa Barbara, though intended principally for circulation there.

Certainly a presumption of the kind was very slight ground upon which one public officer could undertake to set aside the deliberate act of his predecessor, had years before, upon which rights of property rested.

The statute says that the notice must be published in a paper where the place of its publication is nearest the land, not where the place of its distribution is nearest. In one sense a paper is published in every place where it is circulated or its contents are made known; but it is not in that general sense that the language, "place of publication" in the statute is used. That language refers to the particular place where the paper is first issued—that is, given to the public for circulation. Nearly all the great dailies published in the city of New York are distributed in different parts of the country. Large packages of these papers are daily made up and immediately transmitted to California, where the packages are opened and the papers distributed. A large number of them in this mode no doubt find their way to the county of

Santa Barbara, yet it would do violence to our apprehension of the term to say that these papers are published in Santa Barbara, in the sense of the statute. No one so understands the term in ordinary parlance, and it is not used in the statute in any technical sense.

But there is disclosed in the opinion of Commissioner Drummond another fact, which makes it clear that no sufficient or legal publication was made, and that is, that the notice published omits the material statement required by the statute, that a survey and plat of the claim confirmed had been made and approved by the surveyor general. All that is stated in the notice is that the surveyor general had examined and approved of the rancho Guadalupe, confirmed to Olivera and others, and that the plats would be retained in his office, subject to inspection, for four weeks from the date of the publication. A party might, perhaps, reasonably infer that reference was thus intended to some survey of the land, but he would not be obliged to take notice from the statement that the surveyor general had caused a survey and plat to be made, or had approved of one made by others under his directions.

The commissioner appears to have given controlling weight, in overruling the action of his predecessor, to the certificates of Surveyors General Mandeville and Beale, and of a clerk of the United States District Court. The certificates were only *prima facie* evidence, and before the patent was issued, and afterwards, if the patent was properly recalled, the commissioner was at liberty to go behind them, and inquire whether notices had been in fact published as there stated. The certificate of Surveyor General Beale as to the publication was of matters not within his personal knowledge; and the same may be said of the certificate of the clerk, so far as the acts of the surveyor general and his publications were concerned. As to them it was without any value whatever. The clerk can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases, but that is the extent of his authority. His certificate would have been just as valuable as evidence had it related to the acts of the commissioner himself, and yet the commissioner twice refers to it as having some potentiality in the matter.

But aside from all considerations of this kind, the case cannot be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented

upon that evidence because upon its supposed insufficiency Commissioner Drummond justified his attempted annulment of the action of his predecessor and the cancellation of the second patent. If the patent of 1866 could be recalled at all, the sufficiency of that evidence is not a subject for consideration in this form of action, any more than the sufficiency of the evidence upon which any other step in the progress of the proceeding for a patent was taken. As we have already stated, it was the duty of the commissioner, upon receiving a survey transmitted to him as published under the act of 1860, to examine into the regularity and sufficiency of the alleged publication. That was a matter submitted by the law to his determination; and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected on appeal by his superior—the Secretary of the Interior.

The commissioner has undoubtedly a right within a reasonable period, upon proper application, to reconsider any matter previously determined by him, but such right must be exercised before proceedings upon the original ruling have been taken and concluded.

It would be a dangerous doctrine, creating great insecurity in titles, if the correctness of his action upon a matter over which he has jurisdiction could years afterwards be annulled by his successor because of supposed errors of judgment, upon the sufficiency of evidence presented to him: and it would be without precedent and against principle for a court of law in an action of ejectment upon a patent to inquire collaterally into the sufficiency of such evidence to justify the action of the commissioner, and to submit that question to the determination of a jury. The patentee, if such a proceeding were possible, would find his title established in one case and rejected in another, according to the varying judgment of different juries.

It becomes important, therefore, to determine when a patent of the United States for land takes effect—that is, when it becomes operative as a conveyance, and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the government and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the government is bound, the patentee is bound

also, without reference to his assent on the subject; but nothing is further from the fact. No one can be compelled by the government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is, in this respect, no difference between the patent of the government and the deed of a private individual. The question, then, in all cases, is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition, its operation is no longer subject to the control of the grantor; that, then, depends upon the grantee.

The answer to the question is not difficult. If the instrument be the deed of a private individual, it is in a condition for acceptance when it is offered for delivery, that is, when the grantor has parted with its possession, or the right to retain it, in order that it may be given to the grantee. (*Jackson* v. *Dunlap*, 1 Johnson's Cases, 116; *Jackson* v. *Phelps*, 12 John., 418; *Jackson* v. *Bodle*, 20 *Id.*, 184; *Church* v. *Gilman*, 15 Wendell, 656; *Hulick* v. *Scoville*, 4 Gilman, 159; *Bullitt* v. *Taylor*, 34 Miss., 741.) If the instrument be the deed of the government, that is, its patent, it is in that condition when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. By these acts, open and public declaration is made that, so far as the general government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee in

such case takes by matter of record, the law deeming, as says Mr. Justice Story, speaking for the Supreme Court, "the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage." (*Green* v. *Liter et al.*, 8 Cranch, 247.)

In case of a private deed it is essential that the grantor should part with his possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed; with the close of the record the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

But assuming the correctness of this doctrine in cases of ordinary transfers by the government of property, by sale or gift, it is argued by counsel that it has no application to patents issued upon a confirmation of Mexican grants in California.

The argument is that the government in dealing with claims to land under these grants, acts as a sovereign over a subject within its exclusive jurisdiction; and, that in the discharge of its treaty obligations, it has declared in what manner such claims shall be presented, by what officers their validity shall be tested and location determined, and by what document the result of the proceedings, when favorable to the claimant, shall be authenticated. The patent, it has declared, shall be issued by the commissioner when its tribunals have adjudged that the claim is valid and its officers have correctly surveyed it. The claimant, says the counsel, cannot prevent the agents of the government from performing the duties which the law has imposed upon them. He is as powerless to prevent the issue of the patent as he was to annul the survey or control the decree. The law commands the commissioner to issue the patent, and with the discharge of that duty the confirmee cannot interfere. No act of the latter can enlarge or abridge the commissioner's powers. And hence the efficacy of the patent in these cases does not depend upon the acceptance of the patentee.

The argument is plausible, but not sound; it proceeds upon the assumption that an acceptance of the patent must be by assent subsequent to its issue. But subsequent assent is not essential. A previous application for a patent is as persuasive evidence

of its acceptance as any subsequent assent; that is if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851. The claimant asks in effect that his claim may be recognized and confirmed by an appropriate decree; that then a survey conforming to such a decree may be made in the mode prescribed by law, and that a patent thereupon be issued to him. When a patent is thus issued it will take effect without reference to any subsequent action of the patentee. He has in advance, by his proceedings, signified his acceptance. But on the other hand, if the patent in such case be issued without a final survey, that is, one determined in the prescribed mode to be conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He asks what the law authorized him to have, and so far as the law is disregarded in the survey, he stands free as to his acceptance of the result. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged. Such was the case with the patent of 1866; it was issued upon the supposition that the survey had become final by proper publication. The owner of the patent insisted that no such publication had been made, and that the survey was not therefore final and binding upon him and was in fact erroneous, and on that ground refused at once to accept the patent and asked for a new survey. The Commissioner of the General Land Office was, upon this refusal and petition, at liberty to look again into the alleged finality of the survey, that is, into the sufficiency of the publication, for on no other ground than its insufficiency could he depart from the survey returned. The proceeding was one between the patentee and the government, and if the patentees, before accepting the patent, consented that the regular officer of the government might go behind the record and re-examine the matter which had been by law intrusted to him, and correct an error which had been committed by accident, inadvertence, or otherwise, we do not perceive how any third party can object and assail the second patent on that ground. If the defendants, or the other third parties, have superior rights to those of the patentees, they are no more affected by the correction of the error in the survey than

they would have been had the error never been committed. And if they have no such superior rights they cannot, upon any just principle of law or morals, contend that the error committed to the injury of the patentees or their successor in interest shall be forever irreversible. This is not a case where any doctrine of estoppel for alleged acts or conduct of the parties applies.

The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered the transaction is closed; the title has passed, and any subsequent alteration of the instrument or its destruction, cannot affect the grantee's title. But if not accepted when tendered, the deed may be corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the fact that whilst the individual grantor is not restricted in his alterations, the officers of the government acting under the law, can only, even by consent of the patentee, go behind the record to correct an error committed to his injury in disregard of of rights secured to him by the law. The Terrell survey not having become final, and the commissioner being satisfied that it was erroneous, a new survey was properly ordered under the act of 1864, which was then alone applicable. It is conceded that the subsequent proceedings, including the issue of the patent of 1870, were in accordance with its provisions; our conclusion is, that the patent of 1866 was lawfully recalled, and that the patent of 1870 was properly issued, and is a valid instrument, binding both upon the government and the patentees and their successor in interest. After it was recorded, the officers of the government were powerless to change it or cancel it, without the consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded.

The grant upon which the patent held by the defendants is founded, was of a rancho known as La Punta de La Laguna, adjoining the rancho Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by that tribunal in 1854, and by the decree of the District Court of the United States in 1857. This decree, like that in the Guadalupe case, became final by stipulation of the attorney general, abandoning an appeal taken from it to the Supreme Court of the United States. In September, 1860, the claim confirmed was surveyed, under instructions of the surveyor general for California, by the same deputy who surveyed the Gunadalupe rancho, and the survey and plat

were approved, as in that case, on the twenty-ninth of January, 1861, and a similar certificate of publication of notices of the survey and plat in the same papers, and for the same period, was filed by the surveyor general, on the thirty-first of May, 1861. From some unexplained cause, the survey and plat do not appear to have been forwarded to the General Land Office for a patent, until 1873, for the certificate of the original by the surveyor general, incorporated into the patent, is dated in July of that year. The patent, as already stated, was issued in October, 1873. Whatever defect existed in the publication of notices of the survey and plat, in the Santa Barbara *Gazette* in the Guadalupe case, existed in this case. No objection, however, appears to have been taken before the General Land Office on that ground, and objections to the survey of that character were obviated by the acceptance of the patent. The demanded premises are covered by this patent. We have then, the case of two patents regularly issued, each embracing the land in controversy. We must, therefore, look behind them, to the original grants, to ascertain which of them carried the better right to the premises. As already said, they adjoin each other: the eastern line of one is the western line of the other. If we can find this line, the difficulty is, of course, solved. The grant of the Guadalupe rancho only designates generally the location of the land, without giving any specific boundaries, but in April, 1840, which was the month following its issue, possession was officially delivered to the grantee by the magistrate of the vicinage, a proceeding necessary, under the law of Mexico, to complete investiture of title, and called in the language of the country, juridicial possession.

This proceeding involved a measurement of the land, and its segregation from the public domain. A record of the proceeding, showing the measurement and the boundaries established, was made, and a copy is produced in evidence.

The grant of the rancho La Punta de la Laguna describes the land granted as bounded by various designated ranchos.

In January, 1845, juridical possession of these premises was also given to the grantees by a magistrate of the vicinage. A record of this proceeding was also preserved, and a copy is in evidence. These records were before the land commission, and the United States District Court, when the grants were confirmed, and in the decrees of confirmation, the boundaries there given are followed.

If, now, we look at the decree in the case of the rancho of La

Punta de la Laguna, we find the dividing line between it and the rancho Guadalupe thus described:

"Commencing on the top of the Lomas de la Larga, and running northerly over the plain, crossing the middle of the laguna, the distance of ten thousand two hundred varas to the Cuchillo de Nipomi, where two roads ascend, and where a stake was driven as a boundary."

The different objects here stated have all been identified. The position of the top of the Lomas de la Larga is admitted to be at a live oak marked on the survey; the laguna lies where it always did; and the point where the stake mentioned was driven has been shown. The line thus given is the one laid down in the new survey of the Guadalupe rancho upon which the patent of 1870 was issued. We are satisfied that it is the true line. It would serve no useful purpose to go minutely into an examination of the evidence presented against this view. It is sufficient to observe that it has not created any serious doubt in our mind as to the correctness of this line. This conclusion disposes of the question of conflict of boundaries.

It is admitted that the defendants, except such as disclaimed, were in the possession of the premises in controversy at the commencement of the action; but there is no evidence of their possession at any previous period. There is, therefore, no basis laid for the recovery of any other than mere nominal damages for the alleged previous possession; and none, accordingly, will be awarded.

The plaintiff must have judgment for the possession of that portion of the demanded premises which is covered by the patent of 1870, with one dollar damages.

Counsel for the plaintiff will, within ten days, prepare special findings in the case, and submit them to the court for settlement, upon notice to the counsel of the defendants; otherwise, a general finding will be filed.

HENRY MILLER *v.* GEORGE W. ELLIS and EZEKIEL TRIPP.

Supreme Court of California.—October Term, 1875.—51 California, 73.

Delivery of United States patent for land.—Delivery of a patent issued under the provisions of the act of Congress of March 3, 1851, for

settlement of private land claims in California, is not essential to its taking effect as a conveyance.

When patent takes effect—Power of State.—A State has no authority to provide by statute when patents for land issued by the United States for Mexican grants shall take effect.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Ejectment to recover a portion of the rancho Los Animas, in the county of Santa Clara. The court rendered judgment against the defendants.

The defendant, Tripp, appealed.

The other facts are stated in the opinion.

Campbell, Fox & Campbell for appellant.

Houghton & Reynolds for the respondent.

By the court, RHODES, J.:

The plaintiff, in proof of his alleged title, introduced in evidence a copy of a patent issued by the United States to the widow and heirs of Jose Maria Sanchez, under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California." It was in the usual form of patents issued under that act. It was proven by the surveyor general for the State of California, that he had received the patent from the Commissioner of the General Land Office by mail; that he had not delivered it to the grantees; and that he had been directed by the commissioner to withhold the delivery until further orders from the commissioner. The defendant, Tripp, objected to the admission in evidence of a copy of the patent, on several grounds, only one of which, however, requires any consideration; which is, that the patent not having been delivered, did not take effect as a conveyance of the title. No authority is cited by the defendant in support of the objection, but he refers to the Civil Code, sec. 1054, as decisive of the question. That section is as follows: "A grant takes effect so as to vest the interest intended to be transferred only upon the delivery by the grantor." Conceding that this section declares the rule in case of conveyances made under the laws of this State—excepting, of course, legislative grants, and, perhaps, some others—it is manifest that it can have no application to grants made by or under the authority of the United States, for the State has not com-

petent authority to provide the manner in which such grants shall take effect.

It was held in *Donner* v. *Palmer* (31 Cal., 500), in considering the effect of the non-delivery of an alcalde's grant, that the doctrine of delivery, as applied to private conveyances, has no application to grants made by the government, either under the Mexican system or our own. In *Chipley* v. *Farris* (45 Cal., 539), a patent had been issued in pursuance of the act of Congress of March 3, 1851, but the grantees under whom the plaintiff claimed title, refused to receive or accept it. It was held by the court that the patent was one of the steps in the proceedings under the act of March 3, 1851; that the claimant in those proceedings was as powerless to prevent the issuing of a patent as the rendition of a decree of confirmation, where the proceedings have not been dismissed: and that the assent of the claimant to its issue was no more essential than to any other step in the proceeding. We have seen no reason to doubt the correctness of the principle there announced. It necessarily results, therefore, that delivery is not essential to the taking effect of a patent issued under the provisions of the act of Congress of March 3, 1851. (See, also, *Le Roy* v. *Clayton*, 2 Sawyer, 493), which is directly in point; *Lott* v. *Proudhomme*, 3 Rob. La., 293: *Lavergne's Heirs* v. *Elkin's Heirs*, 17 La., 226.)

Judgment and order affirmed.

MR. CHIEF JUSTICE WALLACE, being disqualified, did not sit in this case.

MR. JUSTICE MCKINSTRY did not express an opinion.

MOORE *v.* ROBBINS.

October Term, 1877.—6 Otto, 530.

1. A patent for public land when issued by the land department, acting within the scope of its authority, and delivered to and accepted by th grantee, passes the legal title to the land. All control of the executive department of the government over the title thereafter ceases.
2. If there be any lawful reason why the patent should be canceled or rescinded, the appropriate remedy is by a bill in chancery, brought by the United States; but, no executive officer is authorized to reconsider the facts on which it was issued, and to recall or rescind it, or to issue one to another party for the same tract.

3. But when fraud or mistake or misconstruction of the law of the case exists, the United States or any contesting claimant for the land, may have relief in a court of equity.
4. Under sect. 14 of the act of 1841, 5 Stat., 457, and the act of March 3, 1853, 10 *id.*, 244, no pre-emption claim was of any avail against a purchaser of the land, at the public sales ordered by the proclamation of the President, unless, before they commenced, the claimant had proved up his settlement and paid for the land.
5. The decision of the Secretary of the Interior, against a purchaser at the public sales, in favor of a pre-emption claimant who had failed to make the required proof and payment, was erroneous, as a misconception of the law, and the equitable title should be decreed to belong to the purchaser.

ERROR to the Supreme Court of the State of Illinois.

The facts are stated in the opinion of the court.

Mr. Phillip Phillips for the plaintiff in error.

Mr. R. E. Williams contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception it was a bill in the circuit court for De Witt county to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, on the south half of the southeast quarter, and the south half of the southwest quarter of section 27, township 19, range 3 east, in said county. In the progress of the case the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land, and they were made defendants, and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the southwest quarter of the southwest quarter of said section, and had the patent of the United States giving him the title to it.

Davis answered that he was the rightful owner of the southeast quarter of said southwest quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the President for that district and paid for it, and had the receipt of the register and receiver, and that it was afterwards sold under a valid judgment and execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen that, while Moore and Davis each assert

title to a different forty acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this court must take cognizance.

As regards Moore's branch of the case it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over $2.50 per acre, at a public land sale by the officers of the land district at Danville, Ill., November 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in the favor of Bunn; whereupon Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the Secretary of the Interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent and the Land Department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there in looking at the testimony taken before the register and receiver and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted it follows that Moore, who has the legal title, is in a suit of chancery decreed to give it up in favor one who has neither a legal nor an equitable title to the land.

The Supreme Court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore, on the ground that to the officers of the land department, including the Secretary of the Interior, the acts of Congress had confided the determination of this class

of cases, and the decision of the secretary in favor of Bunn being the latest and final authoritative decision of the tribunal having jurisdiction of the contest, the courts are bound by it, and must give effect to it. (*Robbins* v. *Bunn*, 54 Ill., 48.)

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case.

While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands, and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals, and if the government is the party injured this is the proper course.

"A patent" says the court in *United States* v. *Stone*, (2 Wall.,

525), "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy." See also, *Hughes* v. *United States*, 4 Wall., 232; S. C., 11 How., 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutley without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the Secretary of the Interior, therefore, in Moore's case, was made without authority, and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United

States. It is not denied, however, that to one or the other of the parties now before the court, this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis; to wit, Nov. 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the twentieth day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver, and asserted a right by reason of a pre-emption commenced on the eighth day of November, 1855, to pay for the south half of the southwest quarter and the south half of the southeast quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side, and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the Secretary of the Interior, reversing the commissioner, decided in favor of Bunn.

But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore; and the secretary, therefore, had the authority undoubtedly to decide finally for the land department who was entitled to the patent; and, though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The Supreme Court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this court in *Johnson* v. *Towsley*, 13 Wall., 72. The doctrine announced in that case and repeated in several cases since is this:

That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by

way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question; but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake in the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of *Shepley et al.* v. *Cowan et al.* (91 U. S., 340), the doctrine is thus aptly stated by Mr. Justice Field:

"The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts, when a controversy arises between private parties, founded upon their decisions: but, for mere errors of judgment, upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established, and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn, as of the date which he alleged, his claim is fatally defective in another respect, in which the officers of the land department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of *Atherton* v. *Fowler*, *supra*, we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring, by offering it publicly at competitive sales, before a right to any part of it could be established by private sale, or by pre-emption. In the enforcement of this policy, the act of September 4, 1841, which, for the first time, established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settle-

ments on the public lands as soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that act:

"This act shall not delay the sale of any of the public lands of the United States, beyond the time which has been or may be appointed by the proclamation of the President, nor shall any of the provisions of this act be available to any person, who shall fail to make the proof of [and] payment, and file the affidavit required before the commencement of the sale aforesaid." (5 Stat., 457.)

There can be no misconstruction of this provision, nor any doubt that it was the intention of Congress that none of the liberal provisions of that act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the President's proclamation. We do not decide, because we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the act of 1841, though part of it is found in the Revised Statutes, sect. 2,282, as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time.

The act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at $2.50 per acre before they should be offered for sale at public auction. (10 Stat., 244.)

This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons, who had already settled on such alternate sections, and it may be doubted whether any right of pre-emption by a settlement made afterwards existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that, while Bunn's pre-emption claim comes directly within the provision of both statutes, they were utterly disregarded in the decision of the Secretary of the Interior, on which alone his case has any foundation.

We have no evidence in this record at what time the President's proclamation was issued, or when the sales under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest at public auction. That they were struck off to them a few cents in price above the minimum of $2.50, below which these alternate sections could not be sold, and that this was on the fifteenth day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th day of November, 1855. It is not apparent from this record that he ever gave the notice of his intention to pre-empt the land, by filing what is called a declaration of that intention in the land office. There is a copy of such declaration in the record accompanying the affidavit of settlement, cultivation, and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the record, it is very clear that Bunn "failed to make proof of [and] payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the President. To refuse

Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public aution, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court in Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State must be reversed, and the cause remanded to that court for further proceedings in accordance with this opinion; and it is *So ordered.*

NOTE.—If the first entry is valid, a second patent is inoperative, it conveys nothing. *Patterson* v. *Tatum*, 3 Sawyer, 164.

Where two patents have issued to different persons for the same land, the one issued on the first entry or legal appropriation of the land, will prevail in an action at law. *Stephens* v. *Westwood*, 25 Ala., 716; *Smith* v. *Atherne*, 34 Cal., 506; *Garner* v. *Willit*, 18 Ill., 455. In Wisconsin it was held, that the earliest patent was conclusive in ejectment. *Parkinson* v. *Bracken*, 1 Pinn., 174.

JACOB WIRTH *v.* CALVIN BRANSON AND NATHAN LINDSEY.

(No. 69, October Term, 1878, will be reported in 7 Otto.)

1. Upon the location of a land warrant, the land located becomes segregated from the public domain, and whilst the location was in force, (uncanceled), no other disposition of the land could lawfully be made by the government.
2. A subsequent entry and patent held to be void in an action of ejectment.
3. The doctrine of estoppel not applicable to the facts in this case.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was before us in December term, 1872. It comes before us now on a different state of facts: the original patent to Giles Egerton, which was not produced on the former trial, being produced on the trial which has taken place since our decision, and purports to be for the *southeast* quarter of section 18, instead of the *northeast* quarter in controversy. The question is, whether this fact changes the rights of the parties. A statement of the case, however, is necessary, in order to show the precise questions which are now raised by the record.

The action is ejectment brought by the plaintiff in error to recover a quarter-section of land in Fulton county, Illinois, namely, the northeast quarter of section 18, township 4 north, range 2 east, from the fourth principal meridian. On the trial, the plaintiff produced a regular patent for the lot, issued by the United States to one Edward F. Leonard, dated February 20th, 1868, and a conveyance from Leonard to himself.

The defendants then offered in evidence a duly exemplified copy of a military land warrant, No. 13,598, bearing date December 3d, 1817, issued to one Giles Egerton, a sergeant in the 26th regiment United States infantry, and purporting to be in pursuance of the second section of the act of May 6th, 1812, and certifying that said Egerton was entitled to 160 acres of land to be located agreeably to said act on any unlocated parts of the six millions of acres appropriated for that purpose—it being conceded that the lot in question is part of said military reservation. They then proved, by an exemplified record of the General Land Office at Washington, that the aforesaid land warrant was located according to law, on the 10th day of January, 1818, by Giles

Egerton, on the lot in question. The defendants then gave in evidence an exemplified copy from the records of the land office, of a patent from the United States to Giles Egerton, dated January 10th, 1818, reciting that he had deposited the said land warrant, No. 13,598, in the land office, and granting to him the said lot. On the margin of this certified copy of the patent was written a memorandum, without date, as follows: "This patent was issued for the S. E. ¼ instead of the N. E. ¼, as recorded; sent a certificate of that fact to E. B. Clemson, at Lebanon, Ills.: see his letter of 19th May, 1826." The plaintiff insisted that this memorandum should be read with the record of the patent. In accordance with our decision in the former case (*Branson* v. *Wirth*, 16 Wall., 43), the court refused to allow it to be read. The defendants then offered in evidence a deed from Giles Egerton to Thomas Hart, dated July 29th, 1819, for the southeast quarter of section 18, reciting that the same was granted to said Giles in consideration of his military services, as would appear by a patent dated January 10th, 1818. The defendants then gave in evidence an exemplified copy of a patent from the United States to one James Durney, for the said southeast quarter of section 18, dated January 7th, 1818 (three days prior to the date of Egerton's patent), referring to land warrant No. 5,144 as the basis of the grant. The defendants then gave in evidence a tax title for the lot in question, being a deed from the sheriff of Fulton county, Illinois, to one Timothy Gridley, dated November 14th, 1843, under a judgment of June term, 1840, for the taxes for the year 1839; and also several mesne conveyances from the said Gridley to the defendants in February, 1849; and they proved that they and their grantors had occupied, cultivated, and had full and undisturbed possession of the land ever since November, 1843, paying the taxes thereon. The plaintiff objected to the reception of this evidence, relating to the tax title and possession.

In rebuttal of this defence, the plaintiff gave in evidence a deed for the southeast quarter of section 18, from Thomas Hart to Samuel F. Hunt, dated May 12th, 1824; also a deed from Hunt to one Eli B. Clemson, dated April 7th, 1825; and from Clemson to one John Shaw, dated October 20th, 1829; also an act of Congress, approved March 3d, 1827, entitled "An act for the relief of the legal representatives of Giles Egerton," by which it was enacted that the legal representatives of Giles Egerton, late a sergeant, etc., be authorized to enter with the register of the

proper land office, any unappropriated quarter-section of land in the tract reserved, &c., in lieu of the quarter patented to said Giles on the 10th of January, 1818, which had been previously patented to James Durney. The plaintiff further proved that John Shaw, assignee of Giles Egerton, on the 6th of April, 1838, entered another quarter section in pursuance of this act. The plaintiff then gave in evidence the original patent, dated January 10th, 1818, given to Giles Egerton for the *southeast* quarter of section 18, purporting to be based on the warrant in his favor, numbered 13,598. All this rebutting evidence of the plaintiff was objected to by the defendants, but received by the court.

Upon this evidence, each party asked the court for instructions, and the instructions given were, 1st, that the defendants had proved that the land in controversy was granted by the United States to Giles Egerton on the 10th of January, 1818, and that Egerton had conveyed it to Thomas Hart; which constituted an outstanding title that defeated the plaintiff's right of recovery; 2d, that defendants had shown that on the 10th of January, 1818, the land warrant of Giles Egerton was duly located on and upon the land in controversy, which location was not shown to be vacated or set aside, and therefore said land was not subject to entry by or grant to Leonard in 1868; and a verdict was thereupon given for the defendants. To these instructions the plaintiff excepted; and whether they were correct is the question now before the court.

If either of these instructions was correct in point of law, the judgment must be affirmed; for each was based upon undisputed facts; and if either was correct, the defendants had a complete defense.

We are satisfied that the second instruction, at least, correctly expressed the law of the case, and renders the production of the original patent to Egerton entirely immaterial. The land in question was shown to have been located in his favor in due form, under a regular military land warrant, and no attempt was made to show that this location was ever vacated or set aside. Whilst this location was in force no other could lawfully be made on the same land. A subsequent location, though followed by a patent, would be void. Everything was done, which was required to be done, to entitle Egerton to a patent for the land. Being for military bounty, no price was payable therefor. The land became

segregated from the public domain and subject to private ownership, and all the incidents and liabilities thereof.

The rule is well settled by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract, is to be regarded as the equitable owner thereof; and the land is no longer open to location. The public faith has become pledged to the locator, and any subsequent grant of the same land to another party is void, unless the first location be vacated and set aside.

This was laid down as a principle in the case of *Lytle* v. *The State of Arkansas and others*, 9 How., 314, and has ever since been adhered to. (See *Stark* v. *Starr and others*, 6 Wall., 402.) Subsequent cases which have seemed to be in conflict with these, have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the cases of *Stark* v. *Starr & al.*, 6 Wall., 402; *Frisbie* v. *Whitney*, 9 Wall., 187; *Yosemite Valley Case*, 15 Wall., 77; *Railway Company* v. *McShane*, 22 Wall., 444; and *Shepley* v. *Cowan & al.*, 91 U. S., 338, that it would be supererogation to go over the subject again.

But it is said that Giles Egerton and his grantees, and all other persons, are estopped from any claim under his location of the northeast quarter of section 18, by his accepting a patent for the southeast quarter; and by the further fact that his grantee, finding the southeast quarter already granted to another party, (namely, to James Durney,) applied to Congress for leave to make, and actually made, another location in lieu thereof.

This question of estoppel was fully considered by us when the case was formerly here; and the principles which were then laid down are equally decisive of the case as it now stands. The original patent to Egerton had not then been exhibited in evidence, it is true. But we do not see that the case is materially altered by its production.

The difficulty of applying the doctrine of estoppel arises from the fact that there is no privity between the defendants and the parties who procured the act of Congress referred to. The defendants rely, and have a right to rely, on the fact that the lot

in question was located in due form of law, and that it thereby became exempt from further location until the first location should be set aside. The fact that a clerical error was made in the patent issued to Egerton; that his grantees, instead of claiming the northeast quarter, (as they might have done,) claimed the southeast quarter which had been previously granted to another person; and that they solicited the privilege of locating another lot in lieu thereof—are all matters with which the defendants have nothing to do. Congress might have given to those parties a dozen lots without affecting the defendants, unless the latter were in some way bound by their acts. We are unable to see how they were, or should be, bound thereby. They do not claim under those parties, and have no privity with them whatever.

As, however, the question of estoppel was fully discussed in the previous judgment, it is unnecessary to enlarge upon the subject.

The judgment of the circuit court is affirmed.

WILLIAM J. MINTER AND OTHERS, plaintiffs in error, *v.* CHARLES CROMMELIN.

December Term, 1855.—18 Howard, 87; 1 Miller, 72.

Attacking a Patent for Land.

1. Under the act of March 3, 1817, the Secretary of the Treasury was authorized to decide when an Indian reservee had abandoned his land, and the Secretary alone could offer it for public sale.
2. A patent issued by him for such land carries the presumption that the reservee has abandoned it, and that all the acts necessary to make a perfect sale have been complied with.
3. Although a patent may be defeated by showing a want of power in the officer by whom it was made, this must be established by the party assailing it, and no presumption will be indulged that the secretary did not do his duty in such case.

WRIT OF ERROR to the Supreme Court of Alabama.

The facts are fully stated in the opinion of the court.

Mr. Phillips for plaintiffs in error.

Mr. Bradley for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

The material facts of this case are as follows:

On the 12th April, 1820, a certificate, No. 28, issued from the land office of the United States to Tallasse Fixico, a friendly chief of the Creeks, appropriating to his use and occupancy fraction 24, T. 18, R. 18, east of Coosa river, in pursuance of the act of Congress of 3d March, 1817, passed to carry into effect the treaty of Fort Jackson of August 9, 1814, with the Creek Indians.

The reservee, Tallasse Fixico, was in possession of the land, and while in possession, in 1828, he sold it, for a valuable consideration, to George Taylor, to whom he gave a deed and the possession of the land at the time of the sale.

The said Taylor, while in possession, in July, 1834, sold to C. Crommelin, the defendant in error, a portion of the land—about forty acres. The purchaser received deeds for the same at the time of sale, dated 12th and 14th July, 1834, and immediately, or a short time thereafter, entered into possession, and has continued in possession until the present time.

On the 4th of June, 1839, Isham Bilberry and Samuel Lee obtained from the land office at Cahawba a pre-emption certificate, No. 35,014, in their favor, under the pre-emption act of 1834, for southeast fractional quarter of Sec. 24, T. 18, R. 18, being a part of Tallasse Fixico's reservation, and embracing the land in possession of the defendant in error, and which is the land sued for, namely, the forty acres purchased by him from Taylor.

On the same day, namely, 4th June, 1839, Bilberry and Lee assigned the pre-emption certificate to the plaintiffs in error—Hiram F. Saltmarsh, William T. Minter, and Ashley Parker—in whose favor a patent was subsequently issued.

The State court charged the jury "that if they found the defendant held for a series of years, and continued to hold possession under deeds from Taylor, and that Taylor held possession under Tallasse Fixico, and that the plaintiffs were never in possession, that then the defendant held under color of title, and was in a condition to contest the validity of the patent.

"2. That the certificate of possession which issued to Tallasse Fixico was an appropriation of the land by the government of the United States to a particular purpose, and that if Tallasse Fixico in 1828 or 1829 did abandon said land, it was not subject to entry under the pre-emption laws; that the patent under which the plaintiffs claimed title was issued under the pre-emption laws of the United States; that the land conveyed by said patent was

not subject to entry under pre-emption, and that, therefore, said patent had issued contrary to law, and was void."

To this charge the plaintiffs excepted.

A verdict and judgment were rendered for the defendant, and the plaintiffs took up the cause to the Supreme Court of Alabama, where the judgment was affirmed, to bring up which judgment a writ of error was prosecuted out of this court.

The State court in effect pronounced the patent under which the plaintiffs claimed title to be void for want of authority in the officers of the United States to issue it, on the supposition that the land was reserved from sale when it was entered and granted. The presumption is that the patent is valid, and passed the legal title; and, furthermore, it is *prima facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent. It has been so held by this court in many instances, commencing with the case of *Polk* v. *Wendell*, 9 Cranch, 98, 99.

But if the executive officers had no authority to issue the patent because the land was not subject to entry and grant, then it is void, and the want of power may be proved by a defendant at law. (9 Cranch, 99.) And the question here is, whether the defendant has proved the want of authority.

The 6th section of the act of 1817 provides that no land reserved to a Creek warrior should be offered for sale by the register of the land office unless specially directed by the Secretary of the Treasury.

Both by the treaty and the act of Congress it was declared that if the Indian abandoned the reserved land it became forfeited to the United States. The fact of abandonment the secretary was authorized to decide, and if he did so find, he might then order the land to be sold as other public lands. The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent, and one of the necessary previous steps here being an order from the secretary to the register to offer the land for sale, because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell* v. *Broderick*, 13 Pet., 450, and is not open to controversy anywhere, and the State court was mistaken in holding otherwise.

The defendant being in possession, without any title from the

United States, we deem it unnecessary to discuss the effect of the parol proof introduced in the State Circuit Court to defeat the patent.

It is therefore ordered that the judgment of the Supreme Court of Alabama be reversed.

NOTE.—A patent is the highest evidence of title, and furnishes the presumption that all the prerequisites required by law have been complied with. *Sweatt* v. *Corcoran*, 37 Miss., 513; *Minter* v. *Shirley*, 45 Miss., 376; *Surget* v. *Little*, 24 Miss., 118; *Hill* v. *Miller*, 36 Mo., 182; *Durfee* v. *Plaisted*, 38 Cal., 80; *Collins* v. *Bartlett*, 44 Cal., 371.

REICHART *v.* FELPS.

December Term, 1867.—6 Wallace, 160.

1. A decision in the highest court of a State against the validity of a patent granted by the United States for land, and whose validity is drawn in question in such court, is a decision against the validity of an authority exercised under the United States, and the subject of re-examination here, although the other side have also set up as their case a similar authority, whose validity is by the same decision affirmed.
2. Patents by the United States for land which it has previously granted, reserved from sale, or appropriated, are void.
3. A patent or instrument of confirmation by an officer authorized by Congress to make it, followed by a survey of the land described in the instrument, is conclusive evidence that the land described and surveyed, was reserved from sale.
4. Where the United States, receiving a cession of lands claimed in ancient times by France, and on which were numerous French settlers, directed that such settlers should be "confirmed" in their "possessions and rights," and ordered a particular public officer to examine into the matter, &c., confirmation by *deed* was not necessary. The officer, being admitted to have authority to make confirmation, could make it by instrument in writing without seal.
5. Congress has no power to organize a board of revision to annul titles confirmed many years by the authorized agents of the government.

ERROR to the Supreme Court of Illinois: the case, which was one of ejectment, being thus:

In 1784, after the war of the Revolution, the State of Virginia then claiming the Northwest Territory, a part of which makes the now State of Illinois—and in which, from early times, inhabitants

of Canada, while Canada was yet a French province, had settled—yielded her claim and title in the Territory to the United States, on condition "that the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincent's, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their *possessions and titles* confirmed to them, and be protected in the enjoyments of their rights and liberties."

On the 20th of June, 1788, Congress enacted, that from any general sale of lands in this region there should be a reserve of so much land as should satisfy all the just claims of the ancient settlers: "that they should be confirmed in the possession of such lands, as they may have had at the beginning of the Revolution: that measures be immediately taken for confirming them in their possessions and titles, and that the governor of the Northwestern Territory be instructed to examine the titles and possessions of the settlers, as above described, in order to determine what quantity of land they may severally claim, *which shall be laid off for them at their own expense*."

Under this authority, and some instructions not necessary to be mentioned, but reciting them all, the then governor of the Northwestern Territory, General St. Clair, on the 12th of February, 1799, issued a document, somewhat in the form of a land patent, to one Jarrot, who "laid claim" to a piece of land in the county then and now known as St. Clair, Illinois, "confirming" to him in fee a tract described. This instrument of confirmation, signed by General St. Clair, and duly recognized, October 19th, 1804, ended thus:

"In testimony whereof, I have hereunto set my hand, *and caused the seal of the territory to be affixed*, at Cincinnati, &c., on the 12th day of February, A. D. 1799, and of the Independence of the United States the 23d."

The land claimed and thus described in the patent was regularly surveyed, April 10th, 1798, by one McCann, "lawfully authorized to survey such claims."

This title of Jarrot, thus confirmed, became afterwards vested in one Felps. But an opposing title also came into existence. On the 20th of February, 1812, an act of Congress was passed, authorizing a board of commissioners to revise and re-examine the confirmations made by the governor of the Northwestern Territory; and the board in pursuance of the act, made such a report to the government of the United States, that the government by its proper

officers rejected this claim, and subsequently exposed the land previously confirmed to Jarrot to public sale, when a certain Reichart became the purchaser. Two patents were accordingly issued to him by the United States, one in 1838 and one in 1853. Reichhart, asserting the title conferred by these patents, now brought ejectment in a State Court of Illinois against Felps, relying on his old French claim confirmed by Governor St. Clair.

The plaintiff having given his patents of 1838 and 1853 in evidence, the defendant on his part offered the survey of McCann, and a certified copy from the records of the instrument of confirmation given by Governor St. Clair. On this certified copy no evidence appeared of a seal having ever been on the original; though there was oral testimony tending to show that the original did have a seal in wax, with an emblem and letters.

The plaintiff objected to the survey, and to the copy of the instrument from Governor St. Clair, because it showed that the original had no seal.

The court overruled the exception, and gave judgment for the defendant, so deciding against the validity of the patents of the United States issued in 1838 and 1853; though deciding in effect in favor of the validity of the instrument of confirmation professing to be done under authority of Congress. The judgment having been affirmed in the Supreme Court of Illinois, (*Reichart* v. *Felps*, 33 Illinois, 433), the case was brought here under the 25th section of the Judiciary Act of 1789, giving a right to the court to re-examine the final judgments of the highest State Courts, "where is drawn in question the validity of a statute or of an authority exercised under the United States, and the decision is *against* their validity."

Mr. Baker for the plaintiff in error: a brief being filed for Mr. Koerner.

The deed of cession of 1784, put the title into the United States.

There was no tract of which possession did not vest in the United States. No power was given by any act of Congress to the governors of the Northwestern Territory to issue patents or deeds of confirmation. Moreover, whatever confirmations those governors did issue, were not considered final either by the executive or by Congress.

The copy of the patent shows that no seal was ever affixed to the instrument of confirmation. The instrument was, therefore,

never executed, and is void. Oral testimony cannot countervail the better evidence of the copy.

Mr. Lyman Trumbull contra.

The validity of the confirmation or grant of Governor St. Clair was brought before the Supreme Court of Illinois in 1829, in an ejectment by one Hill, who had entered and obtained a patent for a portion of the premises as public land. The court held the governor's confirmation valid. (*Doe ex dem. Moore and others* v. *Hill*, *Breese*, 236.) After this decision, the United States, recognized it as establishing a validity of the grant by Governor St. Clair, passed an act, August 11th, 1842, refunding the money paid by the patentee who had entered it as public land. (6 Stat. at Large, 860.)

This history of the government's dealing with the land in controversy, shows that it was reserved from the beginning from the public lands which were to be sold, and that the government never intended it should be sold as public land.

The patent issued by Governor St. Clair in 1799 divested the United States of any claim it might have had to the land, and its subsequent sale as public land was therefore void. It is assumed by the plaintiff that no authority was given to the governor of the Northwestern Territory to make confirmations or grants of these ancient possessions and titles; but the act of June 20th, 1788, affords an answer to this assumption, where it instructs the governor of the Northwestern Territory to "examine the titles and possessions of the settlers, *in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense.*"

Who was to determine the quantity of land the claimants were to have, and to lay it off for them at their own expense, except he whose duty it was to examine the titles and possessions for that purpose? When this was done, and the land laid off as the law declared it should be, the United States gave up all claim, if it ever had any, to the land thus set off. No other evidence of this would have been necessary than the survey which was made and entered upon the land office records; and the fact that the governor thought proper to evidence the claimant's right by a more solemn instrument, in the shape of a patent, is only confirmatory of what would have been a good title without it. All that was necessary to be done was to separate the private claims from the

other lands, so that the latter might be brought into market. The United States never pretended to make claim to the lands set off to private claimants; on the contrary, it has, by numerous acts, as shown in the history of this case, recognized them as valid.

The governors exercised this power of confirmation for more than twenty years, and their confirmations are styled patents in acts of Congress. (Act of April 21, 1806: Pub. Land Laws, &c., part 1, 143.)

A grant or a concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power. No excess of or departure from them is to be presumed. (*Delassus* v. *United States*, 9 Peters, 134.)

The land having been thus previously granted, reserved from sale, or appropriated, the patents of 1838 and 1853 are void. (*Stoddard* v. *Chambers*, 2 Howard, 317.)

The objections taken below as to the want of seal, &c., it is submitted, need no reply here. (See what is said in *Reichart* v. *Felps*, the case below, 33 Illinois, 439). The original patent, it is testified had a seal. None, however, was necessary.

MR. JUSTICE GRIER delivered the opinion of the court.

The patents under which the plaintiff claimed in the State court were declared by that court to be void. The case, therefore, is properly cognizable in this court under the twenty-fifth section of the Judiciary Act of 1789.

He claimed under two patents of the dates of 1838 and 1853, which exhibit conclusive evidence of title if the land claimed had "not been previously granted, reserved from sale, or appropriated." The only question to be decided in this case is whether the land had been so granted, reserved, or appropriated.

The patent of Governor St. Clair, February 12th, 1799, duly registered in 1804, with the survey of McCann, April 10th, 1798, are conclusive evidence that the land in question was reserved from sale. The case of *Moore* v. *Hill* (Breese, 236), decided nearly forty years ago in the Supreme Court of Illinois on the same survey and grant which is now before us, should have been conclusive against the objections which have been revived on the present writ of error. "This very able and elaborate opinion received the concurrence of the bar and the country at the time it was delivered, and has never been called in question since. There is no fact in the present case calculated to produce a result

different from the one there announced." (*Reichart* v. *Felps*, 33 Illinois, 439. A. D. 1864, per Breese, J., who reported the case A. D. 1829.)

The objection that the patent from the governor was without a seal ought not to have been made. The act of Congress giving power to the governor did not require him to issue a patent, nor to execute an instrument under seal. Any written evidence of his confirmation would have been a sufficient execution of the power. All that was necessary was an authentic declaration by the United States, through their authorized agent, that they had no claim to the land. It was not a grant by the United States, because the title was not in them.

Congress is bound to regard the public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government: and Congress became afterwards so well satisfied itself of this that it passed an act restoring to the purchasers the money which they had paid for titles obtained on the assumption of such a right.

Judgment affirmed.

CAREY BAGNELL, AND THE EXECUTORS OF MORGAN BYRNE, plaintiffs in error, *v.* GEORGE W. BRODERICK, defendant in error.

January Term, 1839.—13 Peters, 436; 13 Curtis, 235.

If executors are admitted to defend an action of ejectment, it must be because they are devisees; and a judgment against them for costs, *de bonis propriis*, is regular.

Under the act of February 17, 1815, for the relief of the sufferers by earthquakes in the county of New Madrid, in Missouri, (3 Stats. at Large, 211), the land located by the sufferer as a compensation for the land surrendered is not deemed to be appropriated by him, until the survey is returned; the plat and certificate of the survey being the only evidence of location recognized by the government.

Congress has the sole power to declare the effect, and the precedence of titles to the public lands emanating from the United States.

Whatever may be the equities outstanding in third persons, the patentee has the legal title; and a State law cannot confer on the equitable owner, the right to maintain ejectment against the patentee.

The case is stated in the opinion of the court.

Beverly Allen for the plaintiff.

Coxe contra.

CATRON, J., delivered the opinion of the court.

This was an action of ejectment by Broderick against Bagnell, for a section of land lying in Howard county, Missouri, and Peter and Luke Byrne were admitted to come in and defend under the following circumstances:

Morgan Byrne claimed to be the owner of the land, and he was first admitted a co-defendant with Bagnell. Byrne died, and Margaret Byrne, his executrix, was admitted as a co-defendant. Then she died, and Peter and Luke Byrne, executors of the last will of Morgan Byrne, were admitted.

The judgment below is that the plaintiff recover the land, and costs against Carey Bagnell and P. and L. Byrne, executors of Morgan Byrne.

It is assigned for error that the judgment for costs against Peter and Luke Byrne should have been *de bonis testatoris* and not *de bonis propriis*.

The presumption is that the judgment of the circuit court is proper, and it lies on the plaintiffs in error to show the contrary. (1 Pet., 23.) The executors of Morgan Byrne had no interest in the land by virtue of their letters testamentary, but could well have an interest by the will of their testator. On no other ground could they properly have been permitted to come in and defend in the character of executors. On this ground, therefore, we presume they were admitted, and, like other defendants in ejectment, having failed to show the better title, the recovery was proper, and costs necessarily followed the judgment *de bonis propriis*.

The plaintiff, Broderick, claimed by virtue of a patent from the United States, to John Robertson, jr., dated June 17, 1820; and deeds in due form from Robertson and others to himself, proved Carey in possession at the commencement of the suit, and here rested his case.

To show that the better title had been in Morgan Byrne, the defendants produced a deed dated 20th May, 1809, from John Robertson, jr., to Edward Robertson, jr., for seven hundred and fifty arpens of land lying in Big Prairie township in the district of New Madrid, adjoining the lands of Scheckler and Cox, and which deed authorized Edward Robertson to procure a patent from the government. By different conveyances, Morgan Byrne claimed title to the seven hundred and fifty arpens through and under Edward Robertson.

The land lies in the county of New Madrid, in the State of

Missouri, and was injured by the earthquakes of December, 1811. To relieve the inhabitants who had suffered by this calamity, Congress passed the act of 17th February, 1815, providing that those whose lands had been materially injured should be authorized to locate the same quantity on any of the public lands in the Missouri territory, but not exceeding in any case six hundred and forty acres, on which being done, the title to the land injured should revert to the United States.

The recorder of land titles for the territory of Missouri was made the judge "to ascertain who was entitled to the benefit of the act, and to what extent," on the examination of the evidences of claim; as compensation for which, if well founded, he was directed to issue a certificate to the claimant. This certificate having issued, and a notice of location having been filed in the surveyor general's office, on application of the claimant the surveyor was directed to survey the land selected, and to return a plat to the office of the recorder of land titles, together with a notice in writing, designating the tract located, and the name of the claimant on whose behalf the location and survey had been made, which plat and notice it was the duty of the recorder to record in his office, and he was required to transmit a report of the claim as allowed, together with the location by survey, to the Commissioner of the General Land Office, and deliver to the claimant a certificate stating the circumstances of the case, and that he was entitled to a patent for the tract designated. The notice of location made by the claimant with the surveyor general, is no part of the evidence on which the General Land Office acted, but the patent issued on the plat and certificate of the surveyor, returned to the recorder's office, and which was by him reported to the General Land Office.

The United States never deemed the land appropriated until the surver was returned, for the reason that there were many titles and claims, perfect and incipient, emanating from the provincial governments of France and Spain, and others from the United States, in the land district where the New Madrid claims were subject to be located. So there were lead mines and salt springs excluded from entry. Then, again, the notice of entry might be in a form inconsistent with the laws of the United States; in all which cases no survey could be made in conformity to it. If no such objection existed, it was the duty of the surveyor to conform to the election made by the claimant, having the location certificate

from the recorder. Still, the only evidence of the location recognized by the government as an appropriation, was the plat and certificate of the surveyor.

Such is the information obtained from the General Land Office. As evidence of the form of location, and practice of the office, we have been furnished with a copy of the plat and certificate of survey on which the patent in this record is founded, and which is annexed. As before stated, the patent to John Robertson, jr., is deemed to have been issued regularly, and we must presume that all the usual incipient steps had been taken before the title was perfected. (5 Wheat., 293; 7 Wheat., 157; 6 Pet., 724, 727, 728, 742.) And of course, that the certificate of survey returned by the recorder was in the name of John Robertson, jr. The patent merged the location certificate on which the survey was founded, so that no second survey could be made by virtue of the certificate. Thus fortified stands the title of the plaintiff below.

The defendant there relied upon a notice of entry filed with the surveyor general, in these words: "Morgan Byrne, as the legal representative of John Robertson, jr., enters six hundred and forty acres of land by virtue of a New Madrid certificate, issued by the recorder of land titles for the Territory of Missouri, and dated St. Louis, September, 1818, and numbered 448, in the following manner, to wit, to include section No. 32, in township No. 50, north of the base line, range No. 15, west of the fifth principal meridian.

"MORGAN BYRNE.

ST. LOUIS, Oct. 8, 1818."

Which is founded on the following certificate of location:

"No. 448.

"ST. LOUIS, OFFICE OF THE RECORDER OF LAND TITLES,
"*September*, 1818.

"I certify that a tract of six hundred and forty acres of land, situate, Big Prairie, in the county of New Madrid, which appears, from the books of this office, to be owned by John Robertson, jr., has been materially injured by earthquakes: and that, in conformity with the provisions of the act of Congress of the 17th February, 1815, the said John Robertson, jr., or his legal representatives, is entitled to locate six hundred and forty acres of land on any of the public lands of the Territory of Missouri, the

sale of which is authorized by law. (*Vide* Com'rs Cer'e. No 1126, ext'd.

"FREDERICK BATES."

This is obviously the foundation of the survey and patent to John Robertson, jr.—a fact admitted; but it is insisted that Byrne had the better title to the recorder's certificate: that it issued to him, in fact, as the legal representative of John Robertson, jr.; and that the notice of entry filed with the surveyor general, vested in Byrne a title of a character on which he could have maintained an ejectment against Broderick: and that, consequently, his devisees could successfully defend themselves. That they could, if the entry be the better title, must be admitted.

There is evidence in this record tending to show that Morgan Byrne made the relinquishment of the New Madrid claim: but the same evidence (being extracts from the records of the recorder's office), show that the location certificate was granted to John Robertson, jr. They are as follows:

Warr. or ord of survey.	Survey.	Notice to the Recorder.	Quant'y claimed.	Where situated	Opin. of the Recorder.
By U. S. Com'rs for 200 arpens. cer. 1126.		John Robertson, jr.	750 arpens.	Big Prairie.	Ganted 640 acres E.

A list of relinqueshments of lands materially injured by earthquakes in the late county of New Madrid, (present) State of Missouri, under the act of Congress of 17th February, 1815.

Loc'n Cert.	Claimants of record.	Quantity.	Situation.	Relinquishment by whom and general remarks.
448	John Robertson, jr.	640 acres.	Big Prairie.	Morgan Byrne. legal representative.

This evidence, taken in connection with the deeds to Edward Robertson, and those from him and others to Byrne, it is insisted, establish the better equity to have been in the latter, and that this

equity can be made available for the defendants in the circuit court, by force of the act of the legislature of Missouri, which provides that an action of ejectment may be maintained on "a New Madrid location." (See Rev. Code of Missouri, 1825, p. 343, § 2: and Rev. Code of 1835, pp. 234, 235, §§ 1, 2, 9.)

Our opinion is, first, that the location referred to in the act is the plat and certificate of survey returned to the recorder of land titles, because, by the laws of the United States, this is deemed the first appropriation of the land; and the legislature of Missouri had no power, had it made the attempt, to declare the notice of location filed with the surveyor general an appropriation contrary to the laws of the United States. The survey having been made and certified to the recorder, in the name of John Robertson, jr., Byrne had no title that would sustain an ejectment in any case; and, of course, those claiming under him cannot successfully defend themselves on the evidence they adduced.

But, secondly, suppose the plat and certificate of location had been made and returned to the recorder in the name of Morgan Byrne, and that it had been set up as the better title in opposition to the patent adduced on behalf of the plaintiff in ejectment, still, we are of opinion the patent would have been the better legal title. We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robertson, jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne; and having obtained the patent, Robertson had the best title (to wit, the fee,) known to a court of law.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title, until it issues the fee is in the government; by the patent it passes to the grantee, and he is entitled to recover the possession in ejectment.

If Byrne's devisees can show him to have been the true owner of the seven hundred and fifty arpens of land, relinquished because injured by earthquakes, and that the patent issued to John Robertson, jr., by mistake, then the equity side of the circuit court is the proper forum, and a bill the proper remedy to investigate the equities of the parties. But whether any equity existed in virtue of the act of 1815, and if so, whether it was adjudged between the

parties by the recorder of land titles, are questions on which we have formed no opinion, and wish to be understood as not intimating any.

We have been referred to the case of *Ross* v. *Barland*, 1 Pet., 662, as an adjudication involving the principles in this case; we do not think so. In that there were conflicting patents; the younger being founded on an appropriation of the specific land by an entry in the land office of earlier date than the senior patent. The court held that the entry and junior patent could be given in evidence in connection as one title so as to overreach the elder patent. The practice of giving in evidence a special entry in aid of a patent, and dating the legal title from the date of the entry is familiar in some of the States, and especially in Tennessee, yet the entry can only come in aid of a legal title, and is no evidence of such title standing alone, when opposed to a patent for the same land. Where the title has passed out of the United States by conflicting patents, as it had in the case in 1 Pet., there can be no objection to the practice adopted by the courts of Mississippi to give effect to the better right in any form of remedy the legislature or courts of the State may prescribe.

Nor do we doubt the power of the States to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase against trespassers on the lands purchased; but we deny that the States have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect.

For the several reasons stated, we have no doubt the judgment in the circuit court was correct, and order it to be *Affirmed.*

In the cases of *Sampson against Broderick and McCunie against the same*, the judgments are also *Affirmed.*

M'LEAN, J., dissented.

For dissenting opinion, see 13 Pet., p. 451.

MR. JUSTICE M'KINLEY concurred in the opinion with Mr. Justice M'LEAN.

NATHAN E. HOOPER AND OTHERS, plaintiffs in error, *v.* JACOB SCHEIMER.

December Term, 1859.—23 Howard, 235; 3 Miller, 521.

Ejectment.—Register's Certificate no Title.

1. It is the settled doctrine of this court, that no action of ejectment can be sustained in the federal courts on a certificate of entry in the land office. Where the statutes of the State have provided otherwise, it is only binding on the State courts, and not on the federal courts.
2. In all courts of common law the patent from the United States carries the fee, and is the best title known to such courts.

WRIT OF ERROR to the Circuit Court for the eastern district of Arkansas. The case is state in the opinion.

Mr. Stillwell for plaintiff in error.

Mr. Hempstead for defendant.

MR. JUSTICE CATRON delivered the opinion of the court.

An action of ejectment was brought in the Circuit Court of the United States for the eastern district of Arkansas, founded on an entry made in a United States land office. This was the only title produced on the trial by the plaintiffs.

The defendant held possession under a patent from the United States to John Pope, (governor, &c.,) with which the defendant connected himself by a regular chain of conveyances. The circuit court held the patent to be the better legal title, and so instructed the jury, who found for the defendant: and the plaintiffs prosecute this writ of error to reverse that judgment.

By the statute of Arkansas, an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States. (Ar. Digest, 454.)

This court held, in the case of *Bagnell et al. v. Broderick*, (13 Peters, 450), "that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States, that a patent carries the fee, and is the best title known to a court of law." Such is the settled doctrine of this court.

But there is another question standing in advance of the foregoing, to wit, can an action of ejectment be maintained in the federal courts against a defendant in possession on an entry made with the register and receiver?

It is also the settled doctrine of this court that no action of ejectment will lie on such an equitable title, notwithstanding a State legislature may have provided otherwise by statute. The law is only binding on the State courts, and has no force in the circuit courts of the Union. (*Fenn. v. Holme*, 21 How., 482.)

It is ordered that the judgment be affirmed.

No. 60 depends on the same titles and facts and instructions to the jury as are set forth in 59, and the same verdict and judgment were given in the circuit court.

We order it to be affirmed likewise.

NOTE.—The same doctrine held in *Polk* v. *Wendel*, 5 Wheaton, 293; *Patterson* v. *Winn*, 11 Wheaton, 380; *Stringer* v. *Young*, 3 Pet., 320; *Boardman* v. *Reed and Ford*, 6 Pet., 328; *Stoddard* v. *Chambers*, 2 How., 284; *Gilmer* v. *Poindexter*, 10 How., 257; *Ballance* v. *Forsyth*, 13 How., 18; *Greer* v. *Mezes*, 24 How., 268; *Singleton* v. *Touchard*, 1 Black, 342; *Carpenter* v. *Montgomery*, 13 Wall., 480.

If the patent is not absolutely void, but merely voidable, it must prevail in an action at law. *Dodge* v. *Perez*, 2 Sawyer, 645

An equitable title however strong it may be, cannot be set up at law to defeat a legal title by patent. *Baird* v. *Wolf*, 4 McLean, 549.

WILLIAM FENN, plaintiff in error, *v.* PETER H. HOLME.

December Term, 1858.—24 Howard, 481; 3 Miller, 111.

Missouri Land Titles—Ejectment.

1. In an action of ejectment in the courts of the United States, the plaintiff can only recover on the legal title, notwithstanding any statute of the State which authorizes a recovery on an equitable and inchoate legal title.
2. Hence, in a suit on the right conferred by the location of a New Madrid certificate in Missouri, where no patent has issued on said location, the title being in the United States, the action cannot be maintained in the Circuit Court of the United States.
3. The distinction between the remedies at law and in equity, must be preserved in those courts, without regard to State statutes on the subject.

WRIT OF ERROR to the Circuit Court for the District of Missouri. The case is fully stated in the opinion.

Mr. Gibson and *Mr. Gamble* for plaintiff.
Mr. Leonard for the defendant.

MR. JUSTICE DANIEL delivered the opinion of the court.

The defendant in error, as a citizen of the State of Illinois, instituted an action of ejectment against the plaintiff in the court above mentioned, and obtained a verdict and judgment against him for a tract of land, described in the declaration as a tract of land situated in St. Louis county, being the same tract of land known as United States survey No. 2,489, and located by virtue of a New Madrid certificate No. 105, and containing six hundred and forty acres.

Both the plaintiff and defendant in the circuit court trace the origin of their titles to the settlement claim of one James Y. O'Carroll, who, it is stated, obtained permission as early as the 6th of September, 1803, from the Spanish authorities, to settle on the vacant lands in upper Louisiana, and who, in virtue of that permission, and on proof by one Ruddell, of actual inhabitancy and cultivation prior to the 20th of December, 1803, claimed the quantity of one thousand arpens of land near the Mississippi, in the district of New Madrid. Upon this application the land commissioners, on the 13th of March, 1806, made a decision by which they granted to the claimant one thousand arpens of land, situated as aforesaid, provided so much be found vacant there.

On the 14th of December, 1810, the commissioners, acting again on the claim of O'Carroll for one thousand arpens, declare that the board grant to James Y. O'Carroll three hundred and fifty acres of land, and order that the same be surveyed as nearly in a square as may be, so as to include his improvements. The claim thus allowed by the commissioners was, by the operation of the 4th section of the act of Congress, approved March 3, 1813, enlarged and extended to the quantity of six hundred and forty acres. (*Vide* Stat. at Large, p. 813, vol. 2.)

In the year 1812, a portion of the lands in the county of New Madrid having been injured by earthquakes, Congress, by an act approved on the 17th of February, 1815, provided that "any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be and they hereby are authorized to locate the like quantity of land on any of the public

lands of the said territory, the sale of which is authorized by law." (Stat. at L., vol. 3, p. 211.)

On the 30th of November, 1815, the recorder of land titles for Missouri, upon evidence produced to him that the six hundred and forty acre grant to James Y. O'Carroll had been materially injured by earthquakes, in virtue of the act of Congress of 1815, granted to said O'Carroll, New Madrid certificate No. 105, by which the grantee was authorized to locate six hundred and forty acres of land on any of the public lands in the Territory of Missouri, the sale of which was authorized by law. Upon the conflicting claims asserted under this New Madrid certificate, and upon the ascertainment of the locations attempted in virtue of its authority, this controversy has arisen.

Each party to this controversy professes to deduce title from the settlement right of O'Carroll, through mesne conveyances proceeding from him. With respect to the construction of these conveyances, several prayers have been presented by both plaintiff and defendant, and opinions as to their effect have been expressed by the circuit court; but as to the rights really conferred or intended to be conferred by these transactions, it would, according to the view of this cause taken by this court, be not merely useless, but premature and irregular to discuss, and much more so to undertake to determine them.

This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment to establish the right of possession in land.

That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may, however, be seen in the cases of *Goodtitle* v. *Jones*, 7 T. R., 49; of *Doe* v. *Wroot*, 5 East., 132, and of *Roe* v. *Head*, 8 T. R., 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proof of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.

By the constitution of the United States, and by the acts of Congress organizing the federal courts, and defining and in vesting the jurisdiction of these tribunals, the distinction between

common law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in section 2, article 3, of the constitution, it is declared that "the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States," &c.

In the act of Congress "to establish the judicial courts of the United States," this *distribution* of law and equity powers is frequently referred to; and by the 16th section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England.

In the case of *Robinson* v. *Campbell*, 3 Wheat., on page 221, this court have said: "By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the limits prescribed by those laws. By the 24th section of the Judiciary Act of 1789, it is provided, that the laws of the several States, except where the constitution, treaties, or statutes of the United States, shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used as common law in the courts of the United States, and declares that the modes of proceeding in suits in equity shall be according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress by these provisions to confine the courts of the United States, in their mode of

administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective States; in other words, whether it was their intention to give the party relief at law, where the practice of the State courts would give it, and relief in equity only when, according to such practice, a plain, adequate, and complete remedy could not be had at law. In some States in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognize and enforce in suits at law all equitable rights and claims which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the State practice in all its extent, would at once extinguish in such States the exercise of equitable jurisdiction.

"The acts of Congress have distinguished between remedies at common law and equity, yet this construction would confound them. The court therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity—not according to the practice in the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

In the case of *Parsons* v. *Bedford et al.*, 3 Peters, on pp. 446, 447, this court in speaking of the seventh amendment of the constitution, and of the state of public sentiment which demanded and produced that amendment, say:

"The constitution had declared in the 3d article that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, &c. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By common law they meant what the constitution denominated in the 3d article—law, not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in con-

tradistinction to those where equitable rights alone were recognized and equitable remedies administered."

The same doctrine is recognized in the case of *Strother* v. *Lucas*, in 6 Peters, pp. 768, 769 of the volume, and in the case of *Parish* v. *Ellis*, 16 Peters, pp. 453, 454. So, too, as late as the year 1850, in the case of *Bennett* v. *Butterworth*, reported in the 11th of Howard, 669, the Chief Justice thus states the law as applicable to the question before us:

"The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defences in any form that will bring them before the court; and, as there is no distinction in its courts between cases at law and in equity, it has been insisted in this case on behalf of the defendant in error that this court may regard the plaintiff's petition either as a declaration at law or a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States: and, although the forms of proceedings and practice in the State courts have been adopted in the district court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court; but if the claim be an equitable one, he must proceed according to the rules which this court has prescribed regulating proceedings in equity in the courts of the United States."

The authorities above cited are deemed decisive against the right of the plaintiff in the court below to a recovery upon the facts disclosed in this record, which show that the action in that court was instituted upon an equitable and not upon a legal title. With the attempt to locate O'Carroll's New Madrid warrant No. 150, in addition to its interference with what was called the St. Louis common, there were opposed five conflicting surveys. In consequence of this state of facts the Commissioner of the General Land Office, on the 19th of March, 1847, addressed to the surveyor general of Missouri the following instructions:

"If, on examination, it should satisfactorily appear to you that the lands embraced by said surveys were at the date of O'Carroll's location reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of 17th of February, 1815; but if, at the time of location, either of the tracts was not reserved, but was such land as was authorized by the New Madrid act to be located, the New Madrid claim No. 105 will of course hold valid against either tract in this category. The fact on this point can be best determined by the surveyor general from the records of his office, aided by those of the recorder. If there be no valid claim to any portion of the residue of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17th of February, 1815, to be located, on the return here of a proper plat and patent certificate for said residue a patent will issue."

At this point the entire action of the land department of the government terminated. No act is shown by which the extent of the St. Louis common, said to be paramount, was ascertained; no information supplied with respect to the validity or extent of the conflicting surveys, as called for by the commissioner; no plat or patent certificate, either for the whole of the warrant or for any residue to be claimed thereupon, ever returned to the General Land Office, and no patent issued. The plaintiff in the circuit court founded his claim exclusively and solely upon the New Madrid warrant.

The inquiry then presents itself as to who holds the legal title to the land in question. The answer to this question is, that the title remains in the original owner, the government, until it is invested by the government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnel et al.* v. *Broderick*, in which it is declared, "that Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of the legal title. Until it issues the fee is in the government, which by the patent passes to the grantee, and he is entitled to enforce the possession in ejectment. (13 Peters, p. 436.)

A practice has prevailed in some of the States (and amongst them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles

not complete or legal in their character; but this practice, as was so explicitly ruled in the case of *Bennett* v. *Butterworth*, 11 How., can in nowise affect the jurisdiction of the courts of the United States, who, both by the constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.

The judgment of the circuit court is to be reversed with costs.

Allison Ross, plaintiff in error, *v.* John Doe, on the demise of Adam Barland and others.

January Term, 1828.—1 Peters, 655; 7 Curtis, 752.

If both parties assert title under an act of Congress, this court has jurisdiction under the 25th section of the Judiciary Act. (1 Stats. at Large, 85.)

If it be the established practice of the courts of a State, in an action of ejectment, to look behind the patent and examine into the validity of the progressive stages of the title, this court, on a writ of error under the 25th section of the Judiciary Act, cannot examine the correctness of that practice.

A donation certificate, under the act of March 3, 1803, (2 Stats. at Large, 229), gives a title superior to that acquired by a purchase at a public land sale.

No particular form of such certificate is required; it is sufficient if it shows the occupancy required by the act, and what land granted.

The commissioners under the act of 1803, were empowered to hear evidence, as to the time of the evacuation by the Spanish troops, and to decide on the fact.

The case is stated in the opinion of the court.

Wirt (attorney general) for the plaintiff in error.

Coxe for the defendants.

Trimble, J., delivered the opinion of the court.

This was an action of ejectment originally instituted in a circuit court of the State of Mississippi.

Upon the trial of the cause, in the court of original jurisdiction, the defendant excepted to the opinion of the court in overruling instructions moved on his part to be given to the jury, and also to the instructions given by the court at the trial of the cause.

In the bill of exceptions tendered by the plaintiff in error in

the court below are inserted the titles of the parties to the land in controversy, and the facts upon which the questions of law arise, which were decided by the court. A verdict and judgment were rendered against the defendant, from which he appealed to the Supreme Court of the State, being the highest court of law therein, where the judgment was affirmed, and the case is now brought before this court by writ of error to the Supreme Court of the State.

The material facts of the case are the following: The lessors of the plaintiffs in the action of ejectment claimed the land in controversy under and by virtue of a patent from the United States, dated the 13th day of October, 1820, which was given in evidence. This patent emanated upon a certificate of the board of commissioners west of Pearl river, organized under the provisions of the act of Congress of the 3rd of March, 1803, entitled "An act regulating the grants of lands, and providing for the disposal of the lands of the United States, south of the State of Tennessee," which certificate was also given in evidence, and bears date the 13th day of February, 1807. The important parts of the certificate are in the following words, to wit: "Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th day of March, in the year one thousand seven hundred and ninety-eight. We certify that the said Joseph White is entitled to a patent therefor from the United States by virtue of the recited act."

The defendant claimed and held possession of the land under and by virtue of a patent from the United States, dated the 12th day of August, 1819, for 553 acres of land. This patent is founded upon a purchase at the general sale of the lands of the United States, at Washington, Mississippi, under the authority of the before recited act of Congress.

Upon this state of facts the counsel for the defendant moved the court to instruct the jury: "That in such a case the older patent of the defendant, under which he claimed possession, should prevail in the action of ejectment in a court of law against the said junior patent of the plaintiff, although the said junior patent of the plaintiff emanated upon a prior certificate of the board of commissioners west of Pearl river; but the court refused to give such instructions in point of law to the jury, but, on the contrary, instructed them that the junior patent of the said plain-

tiff, emanating upon a certificate of a donation claim prior in date to the patent under which the defendants claims, would overreach the patent of the defendant, and in point of law should prevail against such prior patent of the defendant."

These opinions having been affirmed upon appeal to the Supreme Court of the State, the object of this writ of error is to have them reviewed in this court.

It has been objected that this court has not jurisdiction of the case. By the 2d section of the 3d article of the constitution it is declared "that the judicial power shall extend to all cases arising under this constitution, the laws of the United States, and treaties made or to be made under their authority," &c. By the 25th section of the Judiciary Act of 1789, made in pursuance of this provision of the constitution, it is enacted, "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, &c., specially set up or claimed by either party, &c., under such statute, &c., may be re-examined and reversed or affirmed by the Supreme Court of the United States upon a writ of error."

In this case, the titles of both parties are derived under an act of Congress: the construction of the statute is drawn directly in question; and the decision of the highest court of law of the State is against title and right of the party specially set up in his defence under the statute. This case is not distinguishable from the case of *Matthews* v. *Zane*, 4 C., 382, in which the jurisdiction of this court was maintained.

For the plaintiff in error, it is argued that the State court erred in deciding that the elder grant should not prevail in the action of ejectment.

It is undoubtedly true that, upon common law principles, the legal title should prevail in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law. It is so held in those States in which the principles of the common law are carried into full effect, and the course of proceeding in the action of ejectment are according to those principles. In the States where these principles prevail, it is held that in a trial at law the courts will not look behind or beyond a grant to the rights upon which it is founded; nor examine the progressive stages of the title antecedent to the grant.

But in other States, the courts of law proceed upon other principles. In the action of ejectment, they look beyond the grant, and examine the progressive stages of the title from its incipient state, whether by warrant, survey, entry, or certificate, until its final consummation by grant; and if found regular and according to law in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly.

This latter course seems to be the one adopted and pursued by the courts of Mississippi. It is enough for us to say that in so doing, and in applying their peculiar mode of proceeding to titles derived through and under the laws of the United States, they violated no provisions of any statute of the United States.

The important question in the case is this: In applying its own principles and practice in the action of ejectment, as might well be done to this case, has this court misconstrued the act of Congress, in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners, west of Pearl river, set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment?

This draws in question the construction of the act of Congress of 1803, and gives this court jurisdiction of the case. It is well known that, prior to the treaty of San Lorenzo of the 27th of October, 1795 (8 Stats. at Large, 138), controversies had long existed between the United States and his Catholic Majesty, on the subject of the boundaries which separated the United States and the Spanish provinces of East and West Florida.

The second article of that treaty declares "that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the Mississippi river, at the northernmost part of the thirty-first degree of latitude north of the equator, which, from thence, shall be drawn due east to the middle of the river Appalachicola," &c. And it is agreed, that if there should be any troops, garrisons, or settlements of either party in the territory of the other, according to the above-mentioned boundaries, they should be withdrawn from the said territory within the term of six months after the ratification of this treaty, or sooner if it be possible.

It is matter of public history that there were Spanish troops, garrisons, and settlements north of this boundary, and within the

territory of the United States, which were not withdrawn till long after the time stipulated by the treaty.

By the 2d section of the before-recited act of Congress of the 3d of March, 1803, it is enacted "that to every person, or to the legal representative or representatives of every person, who, either being the head of a family or of twenty-one years of age, did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and culti, vate a tract of land in the said territory, &c., the said tract of land thus inhabited and cultivated, shall be granted: provided-however, that not more than one tract shall be thus granted to any one person, and the same shall not contain more than 640 acres: and provided that this donation shall not be made to any person who claims any other tract of land in the said territory, by virtue of any British or Spanish grant or order of survey."

The 6th section of the act provides for the establishment of two boards of commissioners, one east and the other west of Pearl river, in said territory "for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and the State of Georgia, or of the first three sections of this act. And each board, or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner all matters respecting such claims; also to administer oaths and examine witnesses, and such other testimony as may be adduced, and to determine thereon according to justice and equity; which determination, so far as relates to any rights derived from the articles of agreement aforesaid, or from the first three sections of this act, shall be final."

The 11th section provides "that the lands for which certificates of any description whatsoever shall have been granted by the commissioners, in pursuance of the provisions of this act, shall, as soon as may be, be surveyed. And the said surveyor shall cause all the other lands of the United States in the Mississippi territory to be surveyed."

And the 12th section provides that all the lands aforesaid, not otherwise disposed of or accepted, by virtue of the provisions of the preceding sections of this act, shall (with certain other reservations and exceptions) be offered for sale.

As such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law,

and certificates granted by the commissioners in pursuance thereof, it follows, incontestably, that the right of the plaintiff in the ejectment, derived from a donation certificate, is superior to that of the defendant derived from a purchase at the sales, unless there is some fatal infirmity in the certificate which renders it void. This has not been contested.

But it is objected to this certificate—

1. That it is not a donation certificate.

2. That it is not sufficiently precise, and does not aver all the facts necessary to authorize the commissioners to grant a certificate.

3. The period of occupancy is alleged to be March 30, 1798.

The answer to the first objection is, that the certificate is granted for 640 acres of land, the precise quantity for which a donation certificate was authorized.

This is sufficent evidence of the intention of the board of commissioners to grant a donation certificate. The period of occupancy, too, fits the case of a donation certificate or none, and, if necessary, fortifies the conclusion of its being granted as a donation certificate.

To the second objection, it may be answered that the law requires no precise form in the certificate. It is sufficient, if the proofs be exhibited to the board of commissioners, to satisfy them of the facts entitling the party to the certificate. The facts need not be spread upon the record. It is sufficient if the consideration, to-wit, the occupany, and the quantity granted, appear.

Nothing more is necessary to certify to the government of the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent.

The objection that the occupancy is stated to be on the 30th of March, 1798, produces more difficulty.

The language of the second section of the act of Congress, authorizing these donation claims, is, that the persons who, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, &c.

This language is very peculiar, and shows plainly that, although Congress, at the time of passing the law, was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

The law was intended to confer a bounty on a numerous class of individuals, and, in construing the ambiguous words of the sec-

tion, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature.

To interpret this section literally, that land should be granted to those who, on the same day of the year 1797, occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it, if it should have happened that the final evacuation of the territory by the Spanish troops, took place on the first day of January, 1798, or on any subsequent day.

If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory any day of that year, but some day of the next year; and, although the party continued to occupy the land until the day of the actual evacuation, still, he could not be entitled, according to the letter of the act, because that day was not any day of the year 1797.

This could not be the intention of Congress. The country had been settled during the conflict on the subject of boundaries between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States.

The manifest general intent of the act of Congress is to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant.

If the fact be supposed, and it must be supposed for the sake of the argument, that the actual evacuation took place on the 30th of March, 1798, then something must be rejected in the construction and interpretation of the act of Congress to make the provisions of the law effectual. Either the words "of the year 1797" must be rejected as inconsistent with the main scope and general intent of the law, or the claims to donations of all the inhabitants and cultivators, west of Pearl river, must be defeated. This would but defeat the manifest general intent of the law.

It was said at the bar that all the donation certificates, west of the Pearl river, express to be for occupancy on the 30th day of

March, 1798, and a certificate from the Commissioner of the General Land Office, to that effect, was produced. It is not necessary to decide whether we can or cannot notice this certificate as evidence of the fact that the evacuation took place on that day, or as evidence of the construction given by the board of commissioners west of Pearl river. It is sufficient if they were authorized to give such construction to the act, in the event supposed, that the event happened, or in other words, that the actual evacuation took place on the 30th of March, 1798, as supposed in the argument; and that the construction of the 2d section of the act of Congress, which we are disposed to adopt, is the true construction in the estimate of Congress itself, we think may fairly be inferred from the act of Congress of the 21st of April, 1806. (2 Stats. at Large, 400.) The 4th section of that act provides that, "wherever it shall appear, to the satisfaction of the register and receiver of the district east of Pearl river, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March, 1798, they shall be authorized to grant to the party a donation certificate, in lieu of such pre-emption."

It appears from this section that the commissioners east of Pearl river had adopted the construction of the act of 1803, contended for by the plaintiff in error, and that instead of granting donation certificates to the inhabitants and settlers, down to the period of the 30th of March, 1798, under the second section of the act, they had granted pre-emption certificates under the provision of the 3d section. Congress treats this as a mistaken construction of the law, by directing donation certificates to be made out in lieu of the pre-emption certificates.

The act of 1803 puts the settlers east and west of Pearl river on precisely the same footing; and it is inconceivable that Congress could have any motive for giving those east of Pearl river any preference by the act of 1806, or that the act could have any other object than to continue upon the same footing the settlers east and west of Pearl river.

The certificate granted in the case before us is sufficient evidence that the commissioners west of Pearl river adopted a more liberal construction, such as we think they were warranted in adopting, and such as we think is manifestly sanctioned by Congress in the act of 1806.

It is the opinion of this court that the commissioners were author-

ized to hear evidence as to the time of the actual evacuation of the territory by Spanish troops, and to decide upon the facts. The law gave them "power to hear and decide all matters respecting such claims, and to determine thereon according to justice and to equity," and declares their determination shall be final.

We are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them, and the final evacuation of the territory by the Spanish troops took place on March 30th, 1798.

Upon the whole, it is the unanimous opinion of this court that the Supreme Court of the State of Mississippi has not misconstrued the act of Congress, from which the rights of the parties are derived, and that the judgment of the supreme court be—

Affirmed.

JOHN O'BRIEN, plaintiff in error, *v.* ELIZA M. PERRY.

December Term, 1861.—1 Black, 132; 4 Miller, 397.

Missouri Land Law.

1. Under the 3d section of the act of 1832, and the supplementary act of March 2, 1833, concerning Missouri land titles, a claimant under a Spanish grant, who relinquished his claim, had a right to purchase the land as a pre-emptor, at the minimum price of the public lands, whether an actual settler on it at that date or not.
2. The fact that a town lot had been confirmed to claimants under the act of 1812, which was a part of the land claimed under the act of 1832, did not invalidate his right to purchase under this latter act the whole tract of 640 acres.
3. The Commissioner of the Land Office erred in setting aside the certificate of entry made by the register and receiver to the claimant, and in granting a patent to another purchaser of the land.
4. While it is true, as a general rule, that this error can only be corrected in a suit in chancery, yet where, as in the State courts of Missouri, law and equity are blended in their proceedings, and a party having an equitable defence to an action of ejectment is bound to set it up, this court will, on a writ of error, affirm the judgment of the Supreme Court of the State which sustains the equitable title.

WRIT OF ERROR to the Supreme Court of the State of Missouri.

The facts are well stated in the opinion.

Mr. Neill for plaintiff in error.
No appearance for defendant.

MR. JUSTICE NELSON delivered the opinion of the court.

This action was brought by the plaintiff, O'Brien, to recover possession of a part of section fifteen, in township thirty-seven. He claimed title under a patent of the United States, dated May 4, 1854, which was founded upon a pre-emption certificate under the act of 1841, dated July 3, 1847. His possession or settlement began in April the same year.

The title which the defendants set up began as early as 1795, under Basil Valle, who settled upon the premises, which were situate at a place called Mine au Breton, in Missouri, and continued cultivating and improving the same down to the year 1806, when he sold and conveyed all his interest to John Perry, the ancestor of the defendants. In 1807, Perry, as assignee of Valle, presented the claim before the board of commissioners, enlarging it to six hundred and thirty-nine acres. No decision seems to have been made upon the claim till the meeting of the board in 1811, when it was rejected.

In 1825, William and John Perry, who had become the owners of the claim, had confirmed to them a town lot and out-lot of the village of Mine au Breton, lying within and constituting a part of the original tract of six hundred and thirty-nine acres, under the act of 1812 and the supplemental act of 1824. The dwelling-house of the Perry's was situate on this village lot.

In 1833 the claim was again presented to the board of commissioners, under the act of 1832 and the supplemental act of 1833, and further proof in support of it produced. No decision was made by the commissioners.

In August, 1834, John Perry, Jr., who was then the owner, relinquished all right and title to the claim, by metes and bounds, including the whole tract of six hundred and thirty-nine acres, to the United States, and afterwards applied to the register and receiver to make his entry as purchaser of the tract under the act of 1832, which was permitted on the 26th of November, 1839, satisfactory proof of possession, inhabitation, and cultivation having been furnished and the purchase-money paid. This entry was made under the direction of Whitcomb, the commissioner of the land office; but on appeal to his successor by adverse claimants the entry was canceled on the 5th of May, 1843, three

years and a half after Perry's entry, and which decision was concurred in by the then Secretary of the Treasury.

Subsequently, in 1847, as we have seen, the plaintiff O'Brien was permitted to make an entry for a part of the same premises, and in 1854 a patent was issued to him.

Upon this state of the case and condition of the title the court below held that, by virtue of the waiver and relinquishment of his claim under the act of 1832, Perry became thereby entitled to a pre-emption of the land relinquished, and that the subsequent cancellation of his entry by the commissioner was contrary to law and void.

By the first section of the act of 1832, a board of commissioners was appointed to examine all unconfirmed claims to land in the State of Missouri, theretofore filed in the office of a recorder, founded upon incomplete grants, &c., under the authority of France or Spain, prior to the 10th March, 1804, and to class the same so as to show: 1, what claims, in their opinion, would have been confirmed according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities, if the government under which the claims originated had continued in Missouri; and 2, what claims, in their opinion, are destitute of merit in law or equity under such laws, usages, and customs and practice of the Spanish authorities.

The third section provided that, from and after the final report of the board of commissioners, the lands contained in the second class should be subject to sale as other public lands, and the lands contained in the first class should continue to be reserved from sale as theretofore, until the decision of Congress upon them provided that actual settlers, being housekeepers upon such lands as are rejected, claiming to hold under such rejected claim, or such as may waive their grant, shall have the right of pre-emption to enter within the time of the existence of this act, not exceeding the quantity of their claim, and which in no case shall exceed six hundred and forty acres, including their improvements.

And it is made the duty of the Secretary of the Treasury to forward to the several land offices in said State, the manner in which all those who may wish to waive their several grants or claims, and avail themselves of the right of pre-emption, shall renounce or relinquish their said grants.

In the instructions to the board of commissioners by the Commissioner of the General Land Office, under date of 2d of Novem-

ber, 1832, he observes that this 3d section of the act above recited provides that actual settlers, being housekeepers at the date of the act, upon such claims alleged and filed in the mode specified in the first section, as are rejected, and who claim to hold under such rejected claim; and also, that all claimants who may relinquish to the government claims of the characters designated in the first section, prior to any decision thereon by the board, shall have the right of pre-emption. He also directs that the recorder furnish to the party relinquishing a certified copy of his relinquishment, which shall be evidence of his right to the pre-emption privilege intended to be conferred by the act. The supplementary act of March 2, 1833, extended the provisions of the act of 1832 to all claims for donations of land in Missouri, held in virtue of settlement and cultivation.

This supplementary act embraced the class of claims to which the one in question belongs. As the relinquishment was made by Perry in conformity with the third section of this act of 1832 and the instructions of the Secretary of the Treasury, it is difficult to see any well-founded objection to his right of entry of the land as a pre-emptor, which was permitted by the register and receiver upon satisfactory proof of inhabitation and cultivation on the 26th November, 1839. Indeed, according to the instructions from the commissioner of the land office, the certified copy of the relinquishment would seem to be sufficient evidence of the right of pre-emption, even without further proof.

But this entry was canceled on the 5th May, 1843, by directions of the then commissioner of the land office, and which raises the principal question in the case. As has already appeared, William and John Perry, who then owned the claim, had confirmed to them in 1825 a town lot and out-lot at the village of Mine au Breton, embracing some eight or ten acres, under the act of 1812 and the supplementary act of 1824, and which were included within this claim. The dwellinghouse and outhouses of the Perrys were situated on this town lot, and, indeed, had been thus situated since the purchase from Basil Valle in 1806. The commissioner held that, upon a true construction of the third section of the act of 1832 no claimant was entitled to the right of pre-emption unless he was an actual settler, being also a housekeeper, on the land at the date of the act, and that the condition applied as well to the party relinquishing his claim to the government as to him whose claim had been rejected; and as the town lot, upon which stood

the dwellinghouse of the Perrys, had been confirmed under the act of 1812, he was of opinion it became thereby separated from the remaining portion of the claim, and therefore they were not settlers and housekeepers on the part entered in November, 1839; and this view being concurred in by the Secretary of the Treasury, the register and receiver were directed to cancel the entry of the Perrys.

Now, assuming the construction of the third section as declared by the land commissioner to be correct, and that the Perrys must prove they were actual settlers and housekeepers on the land at the date of the act, we think the conclusion arrived at not at all warranted. The confirmation of the title to the town lot in 1812 did not, in any just or legal sense, affect their claim to the remaining portion of the land, or change the character of the settlement or inhabitation. For aught that appears, the occupation and claim continued the same after the confirmation as before, except that, being secure in the title to the town lot, they were concerned only in their future efforts to obtain the title to the other portion of the land. The act of 1812 was a general act confirming town lots, out-lots, &c., to the inhabitants of villages: and the argument would seem to go the length of requiring the inhabitant to reject the confirmation of his village lot upon which his dwelling stood or forfeit his right to a confirmation of the adjoining plantation, and of holding that his entire claim could not be confirmed in parts by two different acts.

But the conclusive answer to the objection of the commissioner is, that Perry was an actual settler and housekeeper on the land he relinquished to the government at the date of the act, as the deed of relinquishment embraced the village lot and dwelling house as well as the other portion of his claim; and, although the entry was permitted only for the portion less the town lot and outlot, this was not the fault of the claimant, but that of the register and receiver, and cannot be justly used to his prejudice.

We have thus far assumed that the construction of the third section of the act of 1832 by the commissioner, at the time of the cancellation of the entry of Perry, was correct, and have endeavored to show that the conclusion arrived at upon his own premises was erroneous, and afforded no justification for setting aside the entry made under the direction of his predecessor.

But this construction differed from the instructions of the department at the time of the passage of the act, and which were

furnished to the land officers to guide them in its execution. As we have already said, that construction dispensed with the necessity of requiring the claimant to prove that he was an actual settler and housekeeper on the land, in all cases of claims pending before the board of commissioners and undecided. The rejected claims were declared to be public lands, from the time of their rejection by the board; and, of course, no relinquishment was necessary to vest the title in the government. The claimants were then in the condition of those who had no claim on the bounty of the government, except as actual settlers on the land, which furnished a meritorious ground of right to a pre-emption. But the case of claimants whose claims were still under consideration and undetermined was altogether different. They might still be confirmed; and, in that event, the treasury would derive no benfit from them. Congress, therefore, proposed to this class, that if they would relinquish their claims to the government, they should have the right to enter the lands at the minimum price, in preference to all others. This was the inducement held out to them to relinquish their claims. The government had no pecuniary interest, so far as the pre-emption right was concerned, after the relinquishment, whether given to the claimant or to some subsequent settler. The minimum price was all it could receive for the land. The proposal was a compromise offered to this class of claimants. Actual settlement and housekeeping on the land, at the time of the passing of the act of 1832, were not essential prerequisites of their claims before the board as Spanish claims: they depended upon the settlement right, under the act of 1807, and subsequent acts relating thereto.

Without pursuing this branch of the case further, we are entirely satisfied that the commissioner of the land office erred in canceling the entry of Perry, made in 1839, and that it was contrary to law and void, as was also the issuing of the patent to O'Brien upon his subsequent entry for a part of the same land in 1847. This was so held in *Lytle* v. *The State of Arkansas* (9 How., 314), and in *Cunningham* v. *Ashley* (14 *Ib.*, 377); see, also, *Minter* v. *Crommelin* (18 How., 87.)

It is true, in the first two cases, bills in equity were filed in the court below by the persons claiming under the pre-emption right to set aside the patent in one of the cases, and a location, which operated to pass the legal title in the others.

But in the present case, which comes up from a decision in the

Supreme Court of Missouri, though the action was at law by the patentee, to recover the possession, according to the practice of that court, it is competent for the defendant to set up a prior equitable title in bar of the suit, founded upon the legal title to the premises in dispute. *Judgment affirmed.*

NOTE.—Under the State practice in ejectment, an equitable title will prevail over a direct grant subsequently made by the government. *Le Beau* v. *Armitage*, 56 Mo., 191.

In an action of ejectment, brought on a certificate of location, it may be shown by parol evidence that the name of "Lewis" was inserted in the certificate by mistake instead of "Joseph" *Williams* v. *Carpenter*, 42 Mo., 327.

A recovery against one holding under a canceled certificate of entry is no defence to an action brought by the same person to recover the land, under a patent subsequently issued to him on such entry. *McLane* v. *Bovee*, 35 Wis., 37.

RAILWAY COMPANY *v.* MCSHANE ET AL.

October Term, 1874.—22 Wallace, 444.

1. *The Railway Company* v. *Prescott*, (16 Wallace, 603), modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from State taxation.
2. But affirmed so far as it holds that lands, on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from State taxation.
3. Where, however, the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.

APPEALS from the Circuit Court of the United States for the District of Nebraska, in which court the Union Pacific Railroad Company filed a bill to enjoin one McShane, and other persons, severally treasurers of different counties in the said State, through which the road ran, and in which it had lands, from the collection of taxes assessed upon them. There were also cross-bills.

The case was thus:

An act of July 1, 1862, creating the Union Pacific Railroad, enacted (12 Stat. at Large, 489:)

"SECTION 3. That there is hereby granted to the said company, for the purpose of aiding in the construction of said railroad * * * and to

secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land * * * designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limit of ten miles on said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. * * *

"And all such lands so granted. * * * which shall not be sold or disposed of by said company, within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding $1.25 per acre, to be paid to said company."

The statute went on to enact that whenever the company should have completed forty consecutive miles of any portion of its road, ready for the service contemplated by the act, and supplied with all the appurtenances of a first-class road, the President of the United States should appoint three commissioners to examine it and report to him in relation thereto; and if it should appear that forty consecutive miles had been properly completed, then patents were to issue, "conveying the right and title" to the lands to the company, on each side of the road, as far as the same should be completed, to the amount aforesaid; and patents in like manner were to issue as each forty miles of road were completed.

An act of July 2d, 1864, amendatory of this act, after authorizing the company, on the completion of each section of its road, to issue first mortgage bonds on the same to an amount designated, and extending the grant for twenty miles on each side of said road, enacted (13 *Id.*, 356:)

"SECTION 21. That before any land granted by this act shall be conveyed to the said company or party entitled thereto, * * * there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest, as the titles shall be required by said company."

In the case of *Railway Company* v. *Prescott* (16 Wallace, 603), this act was interpreted by this court, upon some clauses not necessary to be here quoted, as making the costs of surveying attach to all the lands granted to the road, whether by the original act of 1862, or by the amendatory act, just quoted, of 1864.

The work of constructing the road was begun in 1865. In 1867, the company, "for the purpose of raising money to aid in the construction," mortgaged its lands to secure the payment of

$10,000,000. The terms of the mortgage required the trustees, upon payment of the bonds, to reconvey the residue of the unsold lands to the company. It reserved to the company the exclusive control and management of the lands, with power to sell the same—the purchase-money, however, to be paid to the trustees, before a conveyance was made. The holder of bonds under the mortgage might purchase lands and pay for them in bonds. Both company and trustees were to join in any conveyance in order to make a title.

By the 1st of April, 1869, a road capable of being safely and speedily traveled on, though susceptible still of many obviously desirable improvements, was practically completed.

On the 10th of that same month, some allegations having been made, that certain subsidies granted by the United States to the company in government bonds, to aid in building the road, had not been applied in the exact way designed by Congress, in the acts granting them, and so as to make the road one absolutely of the "first-class," a joint resolution was passed, by which it was resolved that, to ascertain the condition of the road, the President should appoint a commission of five eminent citizens to examine into the matter and report upon the condition of the road, and to report also what sum, if any, would be required to complete it as a first-class road, such as was contemplated by the acts of Congress. A commission of five eminent citizens was accordingly appointed.

However, the commissioners whom the act of 1862 had directed to decide whether the road was properly built, and in pursuance of the acts authorizing it, having certified that it was so built, the President accepted it May 10th, 1869.

The commission of eminent citizens afterwards reported that, while the road was in its then state a good and reliable means of communication, well equipped, and prepared to carry passengers and freight with safety and dispatch, yet, to make it a first-class road, within their construction of the act of Congress, would, in their judgment, require the expenditure of $1,500,000 more than had as yet been laid out on it.

The joint resolution just above mentioned, by its third section had—

"*Resolved*, That the President is hereby authorized to withhold from said company an amount of subsidy bonds sufficient to secure the full completion as a first-class road, of all sections of

such road, 'or, in lieu of such' bonds, he may receive as such security an equal amount of the first mortgage bonds of such company.'"

The section enacted further, that in case it appeared to the President that the amount of subsidy bonds yet to be issued was insufficient to secure the full completion of the road, requisition should be made on the company for enough subsidy bonds, or enough of its own first mortgage bonds, to secure full completion, and in default of obtaining such security, that measures should be taken "to compel the giving of it, and thereby, or in any manner otherwise, to protect the interest of the United States in said road, and to insure the completion thereof as a first-class road, as required by law and the statutes in that case made."

As to the status of the lands now assessed, it appeared that, at the date of the levy and assessment of the tax in question, the company had dealt with the lands, and was now dealing with them, as if they were in all respects their absolute property. They had mortgaged them, as we have already stated; were now advertising and selling them. They did not recognize the right of the public to settle upon or pre-empt, and to buy them at $1.25 per acre. On the other hand, neither Congress nor the Interior Department had taken any steps to subject the lands to settlement and pre-emption.

Upon the report of the committee of "eminent citizens," under the joint resolution already mentioned, of April 10th, 1869, that $1,500,000 would be required for supplying deficiencies in the road, the Secretary of the Interior, November 3d, 1869, to indemnify the government, ordered that only one-half the lands to which the company would otherwise be entitled should be patented, and that patents for the rest be suspended until further direction from the department. Accordingly, in February, 1871, a patent issued to the company under this order for about 640,000 acres of land, half the quantity of the land; the department refusing to issue a patent for the other half. And so the matter now stood: that is to say, patents for one-half of the company's land were still withheld as security for the completion of its road in matters reported as not up to the required standard.

It also appeared that of the lands situated within the ten-mile limit, every alternate odd section which the company claimed had been patented previous to the assessment and levy of the tax, that the residue of the grants within like limits was unpatented

and that the costs of surveying had not been paid on any lands situated within the ten-mile limit, whether patented or unpatented, because (as was stated by the land agent of the company) not required by the Interior Department.

In respect to the lands situated between the ten and twenty-mile limits, it appeared that they had all been selected, listed, certified, and that the land office fees and costs of surveying had been paid, and every alternate odd section of those claimed by the company patented, the residue being unpatented.

In this state of things, the company, in July, 1873, filed the present bill. It alleged that in 1872 the assessors of the several counties where the lands were situated (which lands were described in lists filed as exhibits with the bill) assessed them, and that the boards of commissioners of the same counties levied taxes for State, school, and local municipal purposes upon them, and that the defendants, the treasurers of these counties, were about to proceed to the collection of those taxes by seizing and selling the locomotives, cars, and rolling-stock generally of the company, with other personal property. The bill alleged further, that the lands were not liable to any State taxation at the time of the assessment or levy, and it prayed that these treasurers might be enjoined from further proceedings for the collection of them.

The grounds on which this exemption was claimed may be divided into three distinct propositions, some of which were applicable to all the lands and others to only part of them.

1. That by the third section of the act of 1862, under which the company was organized, and by which the lands within the ten-mile limit were granted in aid of the construction of the road, it was provided that all such lands as should not be sold within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not to exceed $1.25 per acre, to be paid to the company. And it was alleged that these lands were liable to this pre-emption, which would be defeated by a sale of them for the taxes.

2. That by the amendatory act of 1864, which extended the grant to twenty miles on each side of the road, it was provided that before any of the land granted should be conveyed to the company, there should first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, and that these costs not having been paid,

a sale for taxes would defeat the right of the United States to enforce this claim and recover their expenses out of the lands.

3. That under the joint resolution of April 10th, 1869, authorizing the President to appoint a commission to inquire into the manner in which the road had been constructed, and, if the report was unfavorable, to take steps to secure its proper construction, the secretary had refused to issue patents for these lands, withholding the title as security for the performance of what was required in that respect.

The first two of the above grounds on which an injunction against the taxing was sought, were based upon what the complainants conceived was adjudged in *Railway Company* v. *Prescott* (16 Wallace, 603), it having been there adjudged as they argued,

1st. That whether patented or not patented, the lands were not subject to taxation of the contingent right in the United States of offering them to actual settlers at $1.25 per acre, in case the company did not sell the same within three years from the completion of the road; this objection being based upon the closing part of section three of the act of 1862, *supra*.

2d. That the right of the State did not, according to the language of the syllabus in that case, attach "until the right to the patent was complete and the requisite title was fully vested in the party without anything more to be paid, or any act to be done going to the foundation of the right," and accordingly that prepayment by the company of the cost of surveying, selecting, and conveying the lands granted, being required by statute making the grant, before any of the lands "shall be conveyed," no title vested, even to the patented tracts, unless the required prepayment had been made.

It was contended on the other side, and in behalf of the right to tax, that *Railway Company* v. *Prescott* was unlike this case, since here—

1. The company had mortgaged the lands in anticipation of a completion of the road; and applied the money received to building the road; that this was a "disposition" of the lands within the act of 1862, though it might not be a "sale" within the meaning of the same act.

2. The company had received patents for half of the land.

3. The company had paid surveying fees on all unpatented lands in the grant of 1864, and were ready to pay them on the

grant of 1862, and had not paid them on it only because they were not asked for.

The court below, while it confessed to some difficulty in distinguishing the case of *Railway Company* v. *Prescott*, on either of the two points just stated, from the one now before the court, was still of the opinion that the authority of that case might, as to the first point above-mentioned, be escaped from, so far at least as regarded the lands which the company held by patent. After observing that it would not say whether a mortgage of the lands was such a "disposition" as would prevent the right of settlement or pre-emption, it remarked that in *Railway Company* v. *Prescott* the taxes were assessed before any patent was issued, and, in addition, that the cost of surveying had not been paid. The learned judge in this connection said:

"I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after the three years have elapsed the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain: the price, not exceeding $1.25 per acre, being payable to the company instead of the government.

"If this be a correct view of section three of the act of 1862, it results that the lands of the company, so far as they are patented, are subject to taxation by the authority of the State, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with, and will not defeat the rightful authority of the State to tax the lands."

On the second ground of exemption set up, he said:

"This ground of exemption, in view of the decision in the Prescott case, may be disposed of briefly. Upon the proofs in this case, I am of opinion that lands which have not been patented, either because the costs of surveying required by section twenty-one of the act of 1864 have not been paid, or because patents have been withheld by the Interior Department as indemnity to

make good the deficiencies in the construction of the road are not taxable, and to this extent the injunction will be continued in force. But as to all lands which have actually been patented to the company, the injunction will be dissolved. It is true that as respects the patented lands within the ten-mile limits, the land agent of the company states that the surveying fees have not been paid; but he also states that the reason why they were not paid was that the Interior Department did not require it.

"It does not appear that there are any lands not patented which have been fully earned and set apart to the company upon which all fees have been paid, and for which the patents are not retained by the government for its own security, and therefore, for all practical purposes, I hold that the lands in this case may, upon the proofs before the court, be divided into two classes: 1st, those which are patented and which are taxable; 2d, those which have not been patented and which are not shown to be taxable."

The court below accordingly decreed a dismissal of the bill as to all lands embraced in the company's patent of February 23d, 1871, and an injunction as to the lands which had not been patented to the company.

From that decree both parties appealed: the company, because any of its lands were allowed to be taxed; the county treasurer, McShane, because they were not all taxed.

Mr. A. J. Poppleton for the railroad company.

The lands which have been taxed in this case are situated in the same way as were those in *Railway Company* v. *Prescott*. Both bodies of lands were granted under the same acts of Congress, to be used in the same way, to be held by the same tenure and upon similar conditions. The rule laid down in the case just mentioned must, therefore, govern this case.

That all lands in this case which are unpatented, and upon which the costs of surveying have not been paid, or patents to which are withheld by the government as security for a completion of the road, according to the standard fixed by its charter, are within the rule laid down in the case just quoted, and, therefore, are not subject to State taxation, seems to us too plain for argument. They are clearly within the first ground assigned in that case for non-taxability.

In respect to all the patented lands in this case the exemption rests solely, we admit, upon the second ground laid down in the

same case, to wit, upon "the contingent right (in the government) of offering the land to actual settlers at the minimum price asked by the government for its lands." But we insist that this ground, in the present case, is sufficient and conclusive. It also operates upon both classes of lands.

Does this ground of exemption operate upon the patented lands? The court below, though laboring hard to come to such a conclusion, held that in respect to the patented lands, the case of *Railway Company* v. *Prescott* did not, of necessity, control this.

The real question is, therefore, what is the principle of exemption thus laid down by this court in the case of *Railway Company* v. *Prescott*, and from which the court below sought to extricate the present case? Does it apply less to patented than to unpatented lands? As to one part, failure of the company to perform all conditions precedent to a perfect right to a patent, exempts from taxation; in the other, an interest or a right of the United States in the lands, operates as an exemption. The first is referable to the conduct and interests of the company: the second to the rights of the government.

Is this right of the United States any less worthy of preservation after patent issued than before? Is it cut off by the issue of a patent? If worthy of preservation at any stage, what limit can be assigned except the limit of its existence in the United States? Unless the interest of the United States was erroneously protected in the *Railway Company* v. *Prescott*, (a matter not to be supposed), these lands must be held exempt, on the ground of the contingent right in the government of offering the lands at a minimum price. This contingent right of the United States cannot be cut off by the issue of a patent, for the following reasons:

1. No patent issued under the act could convey a greater or better title than is authorized by it. The patent being merely the evidence of the title granted by the acts of Congress, nothing inserted in it by the officers charged with the administration of the grant could enlarge it.

2. To hold that this "contingent right of offering the land to actual settlers at the minimum price asked by the government for its lands," is extinguished by the issue of the patent, is to nullify the right which this provision was framed to create and protect.

Nothing can defeat the operation of the second ground of exemption upon both classes of lands, except proof that the lands have been "sold or disposed of" by the company, as provided in section

third, act July 1st, 1862. It does not relieve the question to show that the road was completed in 1869. For in that case, the right of the United States to require the sale of the lands at $1.25 per acre, has ceased to be contingent, and become absolute.

Messrs. Clinton Briggs and *J. C. Cowin* for the treasurer, McShane.

I. The company insists that the three years pre-emption clause, contained in the third section of the act of 1862, defeats the right to tax, and relies on *Railway Company* v. *Prescott*. But, assuming—and this is but for the sake of argument—that the court below did not put the right construction on that rather unintelligible section, still the case relied on by the other side does not control this one.

By the terms of the act of 1862, the right to settlement and pre-emption is to exist only in case that the lands are not "sold or disposed of" within three years after the entire road shall have been completed. The lands need not be "sold" within the three years. It is enough that they be "disposed of." When they were mortgaged they were "disposed of," even if they were not "sold."

The road was completed, really, in May, 1869. These lands were mortgaged in 1867. They were, in fact, already disposed of when the road was completed. They were disposed of in 1867, two years before a title to them existed in the company. When, however, a title was obtained by the company in virtue of the completion of their road, that title inured to the mortgagees, on the well-known principle of "estoppel."

The mortgagees, therefore, immediately on the completion of the road—and of course, within the required three years—held a valid mortgage.

This mortgage was for an immense amount, $10,000,000. The bill does not allege that the lands had any value above the mortgage. This $10,000,000 accomplished the same purpose that a like sum would have done if paid by purchasers of the fee, and the purposes of the grant were just as well accomplished in one mode of disposition of the lands as the other. Congress gave the lands—such is the language of the law—"for the purpose of aiding in the construction" of the road. The mortgagees have furnished the aid—$10,000,000.

Their money has enabled the company to build the road and earn the lands.

The mortgagees knew that the money paid was for the precise purpose for which the grant was made; they taking only the risk of the ability of the company to earn the lands with the aid of this money.

The mortgage provides that the bondholder may purchase lands and pay for them in bonds. He has the option to sustain the relation of a mortgagee or that of a purchaser. He has the right to refuse money and demand land in payment at the appraised value. Thus the instrument is more than a mortgage.

Then, in addition, the company in this case has received patents for half its lands, and has paid surveying fees, &c., on those unpatented. It has advertised its lands for sale and sold them; assuming thus and otherwise by its acts an absolute ownership. In these particulars, as in the one just mentioned, the case is distinguished from *Railway Company* v. *Prescott*, so far as that case rests on the obligation to give pre-emption.

II. It is distinguishable also as respects the fees for surveying, &c.:

1. As respects the grant of 1864, the fees for surveying, &c., have been paid in all cases, and whether patent has issued or has not issued.

2. As respects the grant of 1862, these fees are not asked until after patent issues. The land department apparently does not construe as does this court the twenty-first section of the act of 1864, as applying to lands granted by the act of 1862. At all events, it does not require prepayment of the fees for surveying as to lands granted by the act of 1862—lands within the ten-mile limit. The non-payment of these costs, therefore, is no impediment to the company's getting a patent. It is now the equitable owner of these unpatented lands, and so has a taxable interest in them. It is unimportant whether the patent was actully issued or not. The company had earned the lands.

The land department of the United States, indeed, refuses to give a patent for some of the lands, not because the surveying fees are not paid, as is required in regard to the lands granted by the act of 1864 undoubtedly, and as this court has decided as to those granted in 1862 also, but because the joint resolution of 1869 required that security should be got for the making of a certain sort of perfect road. But the joint resolution is not aimed at the lands. It requires that subsidy or other bonds shall be held as security for the expenditure, and if they are not voluntarily given by the company, the Attorney General is required to

institute suits "to compel the giving such security." There is no intimation in the act that lands or patents are to be withheld as such security. The act of the land department in withholding patents is without authority. The commissioners had certified the road; the President had accepted it. Anything further between the company and the United States was a matter for the courts.

The contingent rights in the United States, which in *Railway Company* v. *Prescott* was held sufficient to exempt lands, must, whether coming from the "pre-emption" clause or from the right to retain for payment of costs of surveying, &c., to the eye of a practical man appear, as applied to the present case, but rights of a dim and shadowy sort.

How does the case stand?

1. As respects the United States:

It "granted" the lands to the company in 1862: it accepted the road as completed in 1869, thus declaring that the company had paid for—earned the lands. It issued patent for 640,000 acres in 1871, and received from the company the surveying, &c., on the lands not patented.

2. As respects the acts and declarations of the company:

It accepts the grants made by the United States. It declared in 1869 that it had completed its entire road, thereby asserting it had earned and was entitled to the lands. It receives patents for a part of them, and pays the surveying fees, &c., on the residue. It mortgaged its grant for $10,000,000, and received the money and applied it to building the road. It exercised exclusive acts of ownership by selecting, classifying, advertising them for sale, and selling portions of its grant. It now asks the court to interfere by injunction to prevent, of course, a cloud being cast upon its titles.

Thus, both the United States and the company say that the lands belong to the company. Is not Nebraska, then, justified in so regarding them, and in seeking to make them, as private property, bear a just proportion of the public burdens?

We submit that every consideration of equity and justice is in favor of the tax.

How long, indeed, shall these immense bodies of land remain in the situation in which this company would place them? Not under the control of the United States, so as to be open to settlement and cultivation; not owned by the company, so as to be subject to State taxation, but owned by it when it wants lenders

on mortgage, or when it wants purchasers; owned by it for every beneficial purpose, but not owned for the purpose of bearing any share of the public burdens.

Even if the United States has some claim against the lands for surveying fees or anything else, it is difficult to see how it could be prejudiced by a sale of any of them for taxes. This court said in the case of *Carroll* v. *Safford*, 13 Howard, 462:

"The sale for taxes is made on the presumption that the purchase from the government has been *bona fide*, and if not so made the purchaser at the tax sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government."

A different view seems to have been taken in *Railway Company* v. *Prescott*. But this question is not involved here.

Reply:

The position of the other side is, that the contingent pre-emption right in favor of settlers of the United States, protected by *Railway Company* v. *Prescott*, has been destroyed because the company has mortgaged the lands and so "disposed of" them. But both the legal and the ordinary signification of these words impart an absolute parting with all control over or reversionary interest in the lands. Neither a mortgage nor a contract of sale accomplishes such an alienation of interest and control. In both cases the company retain an interest in the thing mortgaged or contracted to be sold, which may, upon the happening of certain events, revest a complete title in a part or of all the property. Suppose, after the execution of the mortgage, the company had got money, from subsidy bonds, or from some other source, and had discharged the mortgage, not an acre of the land having been yet sold, could it be contended that the simple making of the instrument of mortgage was such "disposition of" the land as would defeat the operation of the third section of the act of 1862?

If such an interpretation be accepted, then a mortgage, however inconsiderable, a contract to survey, with however irresponsible a party—and each with an absolute certainty of reversion to the company of a title in fee—would operate to defeat the intent of Congress.

If, therefore, the purpose and object of Congress in framing the section under consideration, was that authoritatively declared by this court in the case of *Railway Company* v. *Prescott*, it is sub-

mitted with confidence that no form of conveyance, and no species of alienation of granted lands, which falls short of an unconditional parting with the control of and title to the same, either present or reversionary, legal or equitable, can operate to defeat the condition imposed by the section in question.

Therefore, certainly all the lands in controversy, patented or unpatented, not having been either "sold or disposed of" by the company, whether the three years from the date of the completion of the road have elapsed or not, are subject to the contingent right reserved by Congress in the section under consideration, and are, therefore, not subject to taxation.

And the same thing is true of all lands, whether patented or unpatented, upon which the costs of surveying, &c., have not yet been paid. The language of the statute of 1864, is absolute, and has been held by this court, in one part of the same case of *Railway Company* v. *Prescott*, to apply to the ten-mile grant of 1862, as well as to the twenty-mile grant of 1864. Otherwise, by a colorable conveyance, or by a contract of sale, the onerous terms of which would provide for and make sure a forfeiture, or by a mortgage for a sum so inconsiderable as to render redemption morally certain, the whole object of the provision would be easily defeated. Nor is the question modified by the circumstance that the mortgage is for a large sum, especially when it appears that the proceeds of the sales of the lands which are being made are pledged, and are being applied to the payment of the mortgage debt.

The mode adopted by the company for rendering the grant available for the purpose for which it was made, must have been anticipated by Congress when passing the act. Sales of the lands before the road is built, and in quantities such as to realize sums of much use in carrying forward the work, are known to be impossible. By means of a mortgage upon them, with a pledge to its redemption of the proceeds of the sales of the lands, after their value has been greatly increased by the building of the road, the funds for the purpose can be raised, and they have never been raised by other means. With this knowledge, it is impossible to think that Congress, in the terms of the third section, intended to include a mortgage of the lands, and defeat the very important object of the clause, almost at the very moment of enacting it.

The construction contended for on the other side, involves the matter in infinite confusion. This company is selling the lands and applying the proceeds to pay off the mortgage. If, by the

sale of one-fourth thereof, the whole mortgage debt is paid, is there a disposition of the remaining three-quarters?

MR. JUSTICE MILLER delivered the opinion of the court.

We will take up, without restating them, the three several propositions which present the grounds on which the exemption from State taxation is claimed; and, in examining their legal bearing on the case, will, at the same time, where it is necessary, inquire how far they are supported by the facts of the case, and will then look into the other matters set up by way of defence.

The first and second of the propositions relied on by the railroad company, are supposed to find sufficient support in the case of *Railway Company* v. *Prescott* (16 Wallace, 603.)

This was a suit by the Kansas branch of the Union Pacific Railroad Company to have declared void a sale of some of its land for taxes, made under State authority, and this court granted the relief on the ground that the land was not liable to taxation at the time it was assessed for the taxes under which it had been sold. No patent had been issued to the company when the taxes were assessed, and the costs of surveying the land had not been paid to the government by any one.

This court reaffirmed the doctrine that lands which had constituted a part of the public domain might be taxed by the States before the government had parted with the legal title by issuing a patent, but that this could only be done when the right to the patent was complete, and the equitable title fully vested in the party, without anything more to to be paid, or any act to be done going to the foundation of his right. And it said that in that case the United States had a right to retain the patent until the costs of surveying the land had been paid, which had not been done, and that the right of pre-emption in lands unsold by the company within three years after completion of the road, would be defeated if a sale for State taxes could be made which would be valid.

This latter ground was not necessary to the judgment of the court, as it rested as well on the failure to pay the cost of surveying the land. And we are now of opinion, on a fuller argument and more mature consideration, that the proposition is not tenable.

The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since

three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exist, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of *Railway Company* v. *Prescott* asserts a different doctrine, it is overruled.

But the proposition that the State cannot tax these lands while the cost of surveying them is unpaid, and the United States retains the legal title, stands upon a different ground.

The act of 1864, section twenty-one, declares that before any of the lands granted by this act shall be conveyed to the company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same.

That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case, clearly, is not within the rule which authorizes State taxation of lands the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be

made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose.

But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payments of these costs.

It is by retaining the title that the payment of costs of survey is to be enforced.

And so far as the right of the State to tax the land is concerned, we are of opinion that when the original grant has been perfected by the issue of the patent, the right of the State to tax, like the right of the company to sell the lands, has become perfect.

It is admitted that part of the lands in dispute have been patented, and part of them have not. And the circuit judge in his opinion and decree divides them into the patented and the unpatented lands, and we concur in his opinion that there is no reason why the patented lands should not be taxed.

As to those which are not patented, it may be assumed from the evidence in the case that on none of them have the costs of survey been paid or tendered to the United States, and if they are all subject to that provision of the act of 1864 they are not liable, on the principle we have stated, to be taxed. It is said, however, by counsel for the State, that the Interior Department has never demanded the costs of surveying the lands within the original ten-mile limit, in cases in which they have issued patents, and do not claim them in those for which no patent has been issued; that as the non-payment of these costs, therefore, is no impediment to demanding and receiving the patents, the equitable title is complete, and they should be held subject to taxation.

We held, however, in the case of *Railroad Company* v. *Prescott*, that these costs of survey attached to all the lands granted to the road, whether by the original act or by the amendatory act of 1864, and we have no sufficient evidence before us that the Department of the Interior has acted on a different principle. If, however, they have done so heretofore, it is not for us to say that they will grant patents hereafter without payment of these costs; and in a case where we are called on to decide whether such costs are lawfully demandable before the legal title of the company is perfect, we must abide by our own construction of the statute.

It is said, however, that these lands have been mortgaged by

the company under sanction of the act of Congress on that subject, and that the mortgage conveys the legal title out of United States, so that her rights can no longer be interposed to protect them from taxation.

It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage and the act of Congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be divested by the proceedings, because we are satisfied that the United States, until she conveys them by patent or otherwise, has an interest, whether it be legal or equitable, which the State of Nebraska is not at liberty to divest by the exercise of the right of taxation.

Under these views we are of opinion that the State had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued; and as the decree of the circuit court was made in conformity with these principles, it is *Affirmed.*

NOTE.—See *Hunnewell* v. *Cass Co.*, 22 Wallace, 464; *Tucker* v. *Ferguson*, 22 Wallace, 527; *Colorado Co.* v. *Commissioners*, 5 Otto, 259; *Kansas Indian Tax Cases*, 5 Wallace, 737; *New York Indian Tax Cases*, 5 Wallace, 761; *Peck* v. *Miami Co.*, 4 Dill., 370; *Com's Franklin Co.* v. *Pennock*, 18 Kan., 579; *Farrington* v. *Wilson*, 29 Wis., 383; *State of New Jersey* v. *Wilson*, Cranch, 164.

An assessment and sale of land for taxes, while the land belongs to the United States, is void. *McGoon* v. *Scales*, 9 Wallace, 23; *People* v. *Morrison*, 22 Cal., 73; *Hall* v. *Dowling*, 18 Cal., 619; *Wright* v. *Cradlebaugh*, 3 Nev., 341.

Improvements on the public land may be taxed by the State. *People* v. *Shearer*, 30 Cal., 645; *People* v. *Cohen*, 31 Cal., 210; *People* v. *Black Diamond C. and M. Co.*, 37 Cal., 54; *Haas* v. *Misner*, 1 Idaho Ter., 203.

Improvements, which are at common law part of the realty, cannot be taxed while the land belongs to the United States. *Parker* v. *Winsor*, 5 Kan., 362.

As soon as public land has been entered and paid for, it is subject to State taxation. *Carroll* v. *Safford*, 3 How., 441, and this rule applies to donation entries. *Witherspoon* v. *Duncan*, 4 Wallace, 210.

Until the survey of a private land claim has been made and approved by the land department, the land is not subject to taxation. *Whitney* v. *Gunderson*, 31 Wis., 359; *Whitney* v. *Morrow*, 34 Wis., 644.

After entry, a sale for taxes, and a tax deed, will convey the legal title to the land, and the patent afterwards issued, will enure to the benefit

of the holder under the tax deed *Gwynne* v. *Niswanger*, 20 Ohio, 556; *Matthews* v. *Rector*, 24 Ohio St., 439; *Dunn* v. *Hearick*, 14 Ind., 242.

Land entered under the homestead law, cannot be taxed, at least, until the five years residence required by the law has expired. *Moriarty* v. *Boone Co.*, 39 Iowa, 634; *Long* v. *Culp*, 14 Kansas, 412.

It has been held in Nebraska, that land entered under the homestead law becomes subject to taxation, as soon as the five years residence has been completed, although final proof has not been made. *Bollinger* v. *White*, 5 Neb., 399.

A mill on public land held as a homestead, is not subject to taxation, although the mill does not belong to the homestead settler. *Chase Co.* v. *Shipman*, 14 Kan., 532.

At the time of the entry, the law of the State exempted land sold by the government from taxation for five years from the time of purchase. *Held*: That such law was a contract with the purchaser not to tax the land within the five years, and repealing the law could not subject such lands to taxation before the expiration of the five years. *Thompson* v. *Holton*, 6 McLean, 386.

The act of Congress of February 20, 1811, prohibiting the State from taxing land sold by the United States for five years after the sale, does not apply to the lands granted to the State, under the act of September 4, 1841. *Bishop* v. *Marks*, 15 La. Ann., 147.

As to the taxation of bounty lands granted for military services in the war of 1812, see *Sands* v. *Adams Co.*, 11 Iowa, 577; and *Fisher* v. *Wisner*, 34 Iowa, 447.

Under the Wyandotte treaty of January 31, 1855, land sold by the competent class, became subject to taxation from the date of the sale, and not from the date of the approval of the sale by the Secretary of the Interior. *McMahon* v. *Welsh*, Treasurer, 11 Kan., 280.

Under the Miami treaty of June 5, 1854, land patented to a reservee is exempt from taxation while held by the reservee, but becomes subject to taxation as soon as sold by him. *Miami Co.* v. *Brackenridge*, 12 Kansas, 114.

BRONSON *v.* KUKUK.

U. S. Circuit Court, District of Iowa, 1874.—3 Dillon, 490.

1. Until a patent for land emanates, the legal title thereto remains in the United States, and it will protect any equity which the United States may have in the land from a sale for taxes by the State.
2. In 1853, the plaintiff as the assignee of a land warrant, located it upon a tract of land; in 1862, and before any patent had issued, the proper department canceled the warrant and suspended the location, because the warrant had been procured to be issued upon false and forged papers; the plaintiff in the latter part of 1862 substituted

another warrant, and in 1863 received a patent. *Held*, that the land was not taxable for 1861, and that a tax sale and deed for the taxes of that year were void.

3. The assignee of a land warrant fraudulently procured from the government, has no higher legal rights than the warrantee; and the government, although the warrant is regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice.

Before DILLON, Circuit Judge.

Land Warrants—Rights of Assignees—Taxability of Lands Located by Fraudulent Warrant Canceled before Patent Issued.

Ejectment for 160 acres of land. Trial to court. The plaintiff claims title under a patent from the United States to himself, dated June 1, 1863. The defendant is in possession under tax deeds, which are regular, and vest the title in the defendant if the land was subject to taxation under the laws of the State of Iowa for the year 1861. The defendant had no notice of the defect below mentioned in the plaintiff's entry of the land.

On the trial the plaintiff offered in evidence a patent from the United States to himself, dated June 1, 1863, reciting that it is issued pursuant to the bounty land act of March 3, 1855, upon a deposit of land warrant No. 98,864, "the warrant No. 25,269, act of 1850, with which the first location was made, having been withdrawn and the said warrant, No. 98,864, substituted in lieu thereof." The plaintiff then rested.

The defendant offered in evidence: 1. Local land office certificate, dated December 21, 1853, that land warrant No. 25,269 in the name of Jeremin Lasnate had that day been located on the land in question. 2. Tax deed showing that the land was duly sold in 1862 for the taxes of 1861, and other deeds, showing that the defendant held the title, if any, which those tax deeds conveyed. The defendant thereupon rested.

The plaintiff then offered documentary evidence, showing that on the 9th day of May, 1862, the Commissioner of Pensions indorsed upon said land warrant, No. 25,269, the following: "Satisfactory evidence having been furnished me that the papers are false and forged on which this warrant was issued, it has, therefore, been this day canceled and declared void as against the United States," and immediately notified the Commissioner of the General Land Office thereof. This last-named officer, June 18, 1862, notified the register of the local land office "that warrant

No. 25,269, located December 21, 1853, by Seymour G. Bronson, was canceled May 9, 1862, because issued on false and forged papers; that the location is suspended in consequence of such cancellation, and the locator has ninety days to substitute another warrant, or to enter the tract with cash."

The time was afterwards extended, and the plaintiff within such extended time, to wit, December 26, 1863, substituted (as recited in his patent of June 1, 1863, *supra*) said land warrant No. 98,864 in lieu of cancelled warrant No. 25,269. The Commissioner of the General Land Office approved of this substitution January 9, 1863, and notified the local land office, "that the patent would issue as early as practicable, in the name of Seymour G. Bronson."

It was accordingly issued June 1, 1863, and is the only patent for the land in question which was ever issued.

Against the defendant's objection the plaintiff offered the records of the pension office, concerning warrant No. 25,569, which was declared void, and said warrant No. 98,864, and which tended to show that warrant No. 25,269 was issued upon a false and fraudulent application in favor of Jerenin Lasmate, when the real soldier was Jeremin Lasmatre, to whom, for the same service, a warrant had already been issued at the time warrant No. 25,269 was issued. The land is worth $3,000.

Brown & Dudley for the plaintiff.

Gatch, Wright & Runnels for the defendant.

DILLON, Circuit Judge:

The plaintiff located a land warrand on the land in controversy in 1853, but when in 1862 the warrant reached the pension office, in due course, it was pronounced to have been issued on false and forged papers, and it was in consequence canceled on the 9th day of May, of that year, and the plaintiff given time to substitute another warrant, which he did in the latter part of 1862, and received a patent for the land dated June 1, 1863. Meanwhile, the State of Iowa assessed this land for taxation for the year 1861, and sold it in 1862 for the delinquent taxes of the preceding year. If the land was subject to taxation for 1861, the title is in the defendant; otherwise, it is in the plaintiff. Until the patent issued the legal title remained in the United States, yet if "the right to a patent is complete, and the equitable title is fully vested in a party without anything more to be paid, or any act to be done going to the foundation of his right," the land may be taxed,

though no patent therefor has yet emanated. (*Railway Co.* v. *Prescott*, 16 Wall., 603, 608.)

Assuming that the first warrant was procured from the government upon false and fraudulent papers, the location of such a warrant, if made by the warrantee, would not give any equity to the land as against the government. This is clear. And since land warrants are not commercial or negotiable instruments, it is equally clear upon principle and authority (*Mechanics' Bank* v. *New York, &c., Railroad Co.*, 13 New York, 599, 623; *Wilcox* v. *Howell*, 44 New York, 398), in the absence of a controlling statute, that the assignee of a warrant has, as against the government, no higher equities than the warrantee. Not only is there no statute placing the assignee upon better ground than the warrantee, but the act of Congress making land warrants assignable only does so to the extent of "vesting the assignee with all the rights of the original owner of the warrant." (Act of March 22, 1852; 10 Stats. at Large, 3.) The first warrant was decided by the proper officers of the government to have been fraudulently obtained, and the documentary evidence shows that this decision was justified by the facts, and it was acquiesced in by the plaintiff.

If these views are correct the result is that the location of the first warrant did not give a complete equity to the land, and if nothing more had been done the government would have been equitably, as it was legally, the owner of the land, and hence the land was not subject, while this condition of things remained, to taxation. This condition did remain until December 26, 1862, when a valid warrant was furnished by the plaintiff and substituted for the other, and it was upon this warrant that the patent was issued.

These views are inconsistent with the doctrine contended for by the defendant, and which has the sanction of the opinion of Mr. Attorney General Cushing, that if a land warrant has been fraudulently procured from the government, and has passed into the hands of an assignee for value and without notice of the fraud, the government is estopped to question its validity. (7 Opinions Attorney General, 657.) Mr. Wirt, as Attorney General, had given a contrary opinion, distinguishing, as Mr. Cushing failed to do, between commercial and negotiable instruments, which are governed by a peculiar law, and those which, like land warrants, are not of this character.

Assuming that the government is open to estoppel, the same

as individuals, the doctrine for which the defendant contends is one which cannot be maintained on legal principles. It applies only to commercial paper. If the maker of an instrument, although not of a commercial character, makes representations, *aliunde* the instrument on which those to whom the representations are made act, the maker is estopped to deny the truth thereof; but the mere issue of such an instrument cannot alone operate to estop the maker from showing into whosoever hands it may come that its issue was procured by fraud. This subject is so fully examined and so satisfactorily discussed in the New York cases above cited, that it is not necessary to do more than to refer to them.

Another position taken by the defendant's counsel is that, as the patent recites and the evidence shows that the second warrant was substituted for the first, this substitution has the effect to make the plaintiff's title relate back to the entry of 1853, under the first warrant. There is no statute giving the plaintiff the right to make such a substitution or declaring the effect of it. Natural justice, indeed, would dictate that he should have an opportunity preferably to others to pay for the land, and this was properly given to him *ex gratia*, not of legal right, but as against the government, he cannot be regarded as having purchased and paid for the land until he located a valid warrant upon it, and until payment for the land had been made it was not taxable.

It is insisted, however, for the defendant that, although it be true that as against the government the sale of the land for taxes was not valid, yet the plaintiff is estopped as against the defendant from asserting such invalidity. But why? The plaintiff has had no transaction with the tax title purchaser or with the defendant claiming under the tax title purchaser. He has made no representations to either of them, and they have no covenant of his, nor is there any grant or warranty by him so that his title acquired by the location of the second warrant and the patent will enure to them. A purchaser at tax sale buys upon his own suggestion and at his own risk as to the title he obtains, and a subsequently acquired title does not enure to his benefit. There must be a judgment for the plaintiff. *Judgment for plaintiff.*

NOTE.—In the sale of a land warrant, there is an implied warranty that it is valid, and if the department cancel it, the money paid for it may be recovered back. *Presbury* v. *Morris*, 18 Mo., 165.

An action on a guarantee with the sale of a warrant, may be com-

menced as soon as the commissioner decides that the assignment is forged. *Johnson* v. *Gilfillan*, 8 Minn., 395.

The purchaser of a warrant under a forged assignment, obtains no title to the warrant. *Duke* v. *Balue*, 16 Minn., 306. But a *bona fide* purchase of a warrant for value without notice, who has located it and obtained a patent, will not be held as trustee of the land for the true owner of the warrant, because the warrant was obtained by fraud and the assignment of it forged, but the real owner of the warrant is entitled to recover the value of the warrant at the time of its conversion; the good faith in purchasing it is no defense to this legal demand. *Dixon* v. *Caldwell*, 15 Ohio St., 412.

The title to warrants will not pass by delivery without assignment. *Holland* v. *Hensley*, 4 Iowa, 222. But if the warrant is assigned in blank, and sold by one not authorized to sell it, the true owner cannot recover the land located, but may recover the value of the warrant from the locator. *Fort* v. *Wilson*, 3 Iowa, 153.

The owner of a bounty land warrant sold the same, but neglected to execute an assignment The purchaser of the warrant located it in the name of the former owner, and the patent issued to him. *Held*, that the patentee held the land in trust for the purchaser and locator of the warrant. *Key* v. *Jennings*, 66 Mo., 356.

Where a location was canceled, because the warrant was declared fraudulent by the Commissioner of Pensions, and the cancellation was afterward rescinded, it is evidence that the location was wrongfully canceled, and where the land was entered in the meantime by another, and a patent issued thereon, a decree will be entered placing the title in the first locator. *Aldrich* v. *Aldrich*, 37 Ill., 32.

Held the same in case of an alleged forged assignment. *Klein* v. *Argenbright*, 26 Iowa, 493; also see, *Bates* v. *Herron*, 35 Ala., 117.

CALDER, trustee, etc., *v.* KEEGAN.

Supreme Court of Wisconsin, January Term, 1872.—30 Wisconsin, 126.

Public Lands—Liability to Taxation.

Where land of the United States has been entered under a spurious warrant, and the entry suspended to give the locator opportunity to substitute a valid warrant or pay the price in money, the land is not subject to taxation by the State—such locator having no title to it, legal or equitable.

APPEAL from the Circuit Court for Green County.

Action of ejectment. Complaint in the usual form. The answer alleged title and possession in defendant under a tax deed. It appeared in evidence that the land in controversy was located at the Mineral Point land office, by one Ansley, July 24, 1854,

and that on the 16th of January, 1856, the certificate of location was assigned to the plaintiff *Calder*, as trustee of Mary Jane Bramwell. After the certificate of location was issued and before the year 1867, but at what precise time does not appear, the issuing of the patent was suspended at the General Land Office in Washington, on the ground that the warrant on which the land was located had been issued on fraudulent papers. It was shown that the practice of the land office was not to cancel locations in such cases, but to hold them in suspension for a reasonable time, extending in the meantime to the locator or his assignee the privilege of making good the spurious land warrant, either by remedying the defect in the transfer of the warrant located, or by furnishing a substitute warrant of the same denomination and free from objection, or by payment of the cash price of $1.25 per acre, in lieu of the warrant.

It was also shown that on the 3d of June, 1867, a patent was duly issued to *Calder* for the land in question, he having made good the consideration by payment of the cash price. In 1860 the land was assessed for taxes, and in 1861 it was sold by the treasurer of Green county, and on September 21, 1864, one James Smith, grantor of defendant, received a tax deed, under which he went into possession, made improvements and afterward conveyed to defendant. The action was tried before the court without a jury; finding for plaintiff and judgment accordingly, from which defendant appealed.

B. Dunwiddie for appellant.

Smith & Henry and *P. A. Orton, jr., contra.*

DIXON, C. J.:

The position taken by counsel for the defendant with respect to the taxability of the land, is incorrect and cannot be sustained. The land belonged to the United States at the time the supposed taxes were levied, and so was not liable to taxation. It was a case of suspended entry under a spurious land warrant, where, under the practice, as shown by the letters of the Commissioner of the General Land Office, contained in the record, no title whatever passed to the locator or to his assignees of the certificate until the same was actually paid for, either by the substitution of another and a valid warrant of the same denomination, or the substitution of cash for the warrant at the rate of $1.25 per acre.

After the suspension, which was merely for the purpose of

giving the locator due notice and reasonable time to pay for the land as above stated, and before cancellation of the entry, the title was held by the United States, subject to be acquired in that way by the locator or his assignees of the certificate, as a matter of mere grace or favor to him or them. There was no contract relation between the United States and the locator by which the United States was bound to sell him the land or to issue a patent therefor to him or his assigns, on payment or tender of the money or of another land warrant of the same denomination.

In such case it seems idle to talk about the locator having any taxable interest in the land, or that the title of the United States was any more subject to be interfered with by the State power of taxation, than if no steps whatever had been taken by the government towards a sale or disposition of it. The right of the States to interfere in any manner so as to cut off or defeat the title emanating by patent from the United States in cases like this, has been very emphatically denied by the supreme court in a recent decision, and a printed copy of the opinion is now lying before us. (*Gibson* v. *Chouteau*, 13 Wallace, 92.) We regard that case as decisive of the question here presented, and as showing that the State could not step in and tax the land by anticipation, and that the doctrine of relation by which the supposed holder by tax deed would deprive the purchaser of his title obtained from the United States, is wholly inapplicable, and cannot be made to answer any such inequitable and unjust purpose. It is generally enough for people to pay taxes upon land after they have obtained the title, without being compelled to forfeit their estate or to pay those assessed whilst it was owned by the United States and before they had acquired any interest, legal or equitable, in it.

By the court: *Judgment affirmed.*

MICHAEL DONOVAN *v.* JOHN KLOKE.

Supreme Court of Nebraska, October Term, 1877.—6 Nebraska, 124.

1. *Public lands; Taxation of.*—Lands purchased from the United States by private entry are subject to taxation, as soon as the sale is completed by the payment of the purchase-money. But, until this time the land is not so liable, and every step taken by way of the assessment or levy of taxes is void.
2. ——— ; *Purchase of.*—The plaintiff, in 1869, purchased at private

entry the southeast quarter of a section of public lands, and received the usual certificate. In 1873, this entry was canceled, and he was permitted to enter in lieu thereof, the northeast quarter of the same section. But instead of issuing to him a new certificate, the old one numbered 2,558, was so changed by writing across its face as to make it apply to the latter tract, but without changing its date. *Held*, that by this transaction as to the northeast quarter, the plaintiff became the owner in 1873, and not in 1869, the date of the certificate.

3. ———; ———; *Certificate of purchase; Change of.* Where a certificate of purchase is so changed, it will be given the same effect as if it were actually issued at the date of such substitution.

APPEAL from the District Court of Cuming County.

Tried below before SAVAGE, J.

The opinion states the facts in the case.

Uriah Bruner for appellant.

The admission of the testimony to show the error in the entry is incompetent and irrelevant.

Where contracts have an ascertained and fixed meaning, the acts of the parties under which the contracts are made are inadmissable. (*Giles* v. *Comstock*, 4 N. Y., 270: 1 Best on Ev., 223, and citations.

Recitals in a deed are binding upon all claiming under the deed. (*Douglas* v. *Scott*, 5 Ohio, 194; *Denn* v. *Brewer*, 1 N. J. L., (Coxe) 172; *Iuskeep* v. *Shields*, 4 Harr., (Del.), 345; *Byrne* v. *Moorehouse*, 22 Ill., 603; *McLesky* v. *Leadbetter*, 1 Ga., 551; *Stewart* v. *Butler*, 2 Serg. & R., 381; *Jackson* v. *Parkhurst*, 9 Wend., 209.)

A party shall not claim an interest under an instrument without giving full effect to that instrument as far as he can. (Willard's Eq. Jur., 545.)

An order of a court authorizing a sale of real estate made subsequent to the sale, cannot be given in evidence to sustain such sale. (*Lessee of Ludlow's Heirs* v. *Park*, 4 Ohio, 5.)

Parol evidence, or other extrinsic evidence, is not admissible to vary, contradict, or explain the contents of a contract, except for ambiguity or uncertainty apparent on the face thereof. (1 Greenl. Ev., 275–6–7, 282.) Parol evidence is admissible to explain a *latent* ambiguity in the deed. (1 Greenl. Ev., 284–6, 297 to 300; Best on Ev., 226.)

The land is taxable. (*Franklin* v. *Kelly*, 4 Neb., 90: *Carrol* v. *Safford*, 2 How., 441.)

Crawford & McLaughlin for appellee.

The plaintiff's entry of the southeast quarter was canceled and the money ordered to be refunded to him, or, if he preferred, he could have the northeast quarter, and he decided to take the latter, and the local officers instead of giving plaintiff a new certificate amended the old one, and now the attorney for defendant, who was then receiver of the land office, and who amended the certificate when it was his duty to issue a new one and canceled the old, insists that plaintiff became the owner of the northeast quarter in 1869, instead of 1873; that by his act of amending said certificate he legalized taxes that were illegal and void.

We need cite no authorities to convince this court that such a proposition is untenable; nor do we deem it necessary to notice the authorities cited by defendant further than to say, that they have no more application to this case than any other case before this court.

LAKE, CH. J.:

This is an appeal from a decree of the district court for Cuming county perpetually enjoining the defendant and his successors in office from executing or delivering a tax deed for the northeast quarter of section one, township twenty-three, range seven east, in pursuance of a tax sale of the land for taxes levied for the year 1872, and the main question presented for our decision is, whether this land was liable to taxation for that year.

Donovan purchased this land directly from the United States by private entry, and it was, of course, subject to taxation as soon as the sale was completed by the payment of the purchase price. (*Bellinger* v. *White*, 5 Neb., 399.)

But until this time the land was not so liable, and every step taken by the local county officers, by way of the assessment of the lands for taxation or the levy of taxes was absolutely void. The ownership of the land, therefore, at the time of the levy of the taxes complained of, is the important fact to be settled.

The testimony bearing upon the question of ownership is brief and not at all conflicting. It appears from the evidence of Donovan, on the third day of April, 1869, at the local land office of the United States at Omaha, entered and paid for the southeast quarter of the above-mentioned section, and received the usual certificate therefor. By mistake, however, of the register, this purchase was entered upon the tract-book as being the northeast

quarter of the section, but the records of the receiver and the report of the sale transmitted to the general office at Washington, conformed to the certificate, and were correct. By another mistake of the local officers, Donovan's entry conflicted with a prior one made June 3, 1868, on the same land, by one Gustave Romsnoski, and for this reason was duly canceled by the Commissioner of the General Land Office on the fourteenth of March, 1873, as appears by his letter of that date. At this time, and by this very letter, Donovan was given the option either to take the northeast quarter, which was then subject to private entry, or, if he preferred it, a return of the money paid for the land he had actually purchased. He decided to take the land, and the patent under which he holds the legal title to the land in controversy, was issued to him in pursuance of this arrangement.

By the terms of the option given to Donovan, he was required to make his election as to which he would take, within thirty days, and his ownership would date from the time that he did so. It is clear, therefore, that up to this time, this land was the property of the United States, and any steps taken to encumber it by the levy of taxes or sale to enforce their payment, would be absolutely void as against both the government and its grantee.

We entertain no doubt, whatever, that the alleged levy of taxes for the year 1872, and the sale thereunder, were not only in violation of the first section of our revenue act, which declares that the property of the United States "shall be exempted from taxation," but also of the compact entered into between the State and the general government at the time of our admission into the Union, "that no taxes shall be imposed by said State on lands or property therein belonging to, or which may hereafter be purchased by, the United States."

It was urged with much earnestness by defendant's counsel that, inasmuch as the patent for this land recites the original certificate, No. 2,558, issued to Donovan at the time of his entry, in April, 1869, he is estopped from denying that his ownership dates back to that time. Ordinarily, this would be the proper construction to apply to such a recital, but it is not applicable to a case where, as here, it is shown by the certificate and other satisfactory evidence, that a mistake had occurred, resulting in the cancellation and loss of the first purchase, and that, by a mutual arrangement between the government and purchaser, as late as August 12, 1873, the certificate was so changed as to make it apply to

other land taken in lieu of that first entered. The change noted on certificate No. 2,558, is in these words: "Amended to read northeast quarter-section one, township twenty-three, range seven east, August 12, 1873," and signed by the receiver of the land office. This change was made in pursuance of the arrangement before mentioned between the commissioner and Donovan, by which the land in controversy was substituted for that originally purchased, and the certificate so changed must be given the same effect as if it were actually issued at the date of such substitution.

The holding of the district court having been in conformity with these views, was right; and a decree will be entered in this court making the injunction heretofore granted perpetual.

Decree accordingly.

NOTE.—A change of entry cannot be made to land entered by another, between the date of the first entry and the change. *Rankin* v. *Miller*, 43 Iowa, 11.

The commissioner is authorized to allow a change of entry to be made, only in cases where the mistake occurred in the "true numbers" of the land intended to be entered. If one enter the numbers intended, there is not the mistake contemplated by the act, because the numbers do not include land which the purchaser supposed was embraced in the numbers entered. And in any event the change can only be allowed to cover unsold public land.

If the land intended to have been entered, has in the meantime been entered by another, such entry cannot be canceled to make room for a change of entry. And where the commissioner canceled an entry to allow a change of entry to the land, the change not being authorized by law is null and void, and the patent issued on such change of entry is void in a court of law. *Martin* v. *Blankership*, 5 Mo., 346.

An entry by mistake of lands previously sold by the United States does not entitle such person to a change of entry. *Carman* v. *Johnson*, 29 Mo., 84.

A conditional entry cannot be allowed by the register and receiver. An entry once made cannot be changed so as to interfere with the rights of others. *McDaniel* v. *Orton*, 12 Mo., 12.

Where a pre-emption right has been once claimed, it cannot be transferred to another tract to the injury of other settlers, although the pre-emptor might originally have claimed either tract. *Keller* v. *Belleaudeau*, 6 La. Ann., 643.

SAMUEL VERDEN, appellant, *v.* ISAAC COLEMAN.

December Term, 1859.—22 Howard, 192; 3 Miller, 287.

Jurisdiction over State Courts.

An appeal from a decree of a State court dismissed, because no case can be brought here from a State court in any other mode than by writ of error.

APPEAL from the Supreme Court of Indiana.

No writ of error was sued out or filed.

The opinion states the facts.

MR. JUSTICE CATRON delivered the opinion of the court.

Coleman sued Verden in a State court of Indiana, on a note of hand, and a mortgage of lands to secure its payment. On various pleadings and proofs, the cause was submitted for judgment to the court, the parties having dispensed with a jury. Judgment was rendered against Verden, who appealed to the Supreme Court of Indiana. There the judgment of the circuit was affirmed.

This occurred on the 26th day of June, 1858. And then we find the following entry of record:

"And afterwards, to wit, at a court began and held on the 24th of May, 1858, and continued from day to day till July 16th, 1858, at which time comes the appellant, by Hon. D. Mace, his attorney, and prays an appeal to the United States Supreme Court, which prayer is granted."

Bond was given to prosecute the appeal, and the clerk certifies the record to be a true copy of the proceedings.

No appeal can be taken from the final decision of a State court of last resort, under the twenty-fifth section of the Judiciary Act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. We refer to the appendix of Curtis' Digest for the mode.

It is ordered that the case be dismissed.

SEMPLE *v.* HAGAR.

December Term, 1866.—4 Wallace, 431.

1. When a want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an examination of the

questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction.

2. Where two parties held patents for land from the United States, under Mexican grants, both of which included the same lands in part, and one of the parties brought a suit in a State court to vacate the patent of the other, to the extent of the conflict of title, and the State court refused to entertain jurisdiction of the question, and dismissed the complaint, this court has no jurisdiction under the twenty-fifth section of the Judiciary Act, to review the judgments.

Semple filed a bill against Hagar in one of the State courts of California. The bill alleged that he, the complainant Semple, had obtained a patent from the United States for a tract of land, based upon a Mexican grant for the same land, known as the "Colus" grant; that the land so granted had been surveyed by the United States, and included certain lands enumerated: that the defendants claimed part of the same land under a Mexican grant known as the "Jimeno" grant, for which a patent had also been issued by the United States to the defendants; that the surveys of the said grants overlapped; that the grant of the "Jimeno" tract had been obtained by fraud and was a cloud on the complainant's title. The prayer of the bill was that the court might declare "the said fraudulent grant, commonly called the 'Jimeno Rancho, void and of no effect, as issued upon false suggestions, and without authority of law."

The defendant demurred to this bill, setting forth nine several grounds of demurrer, and among them these:

1st. That the court had no jurisdiction of the subject of the action.

2d. That there was a defect of parties plaintiff.

3d. That there was a defect of parties defendant.

The court below made a decree dismissing the bill; a decree which on appeal the Supreme Court of California, the highest court of equity of the State, affirmed.

The case was then brought here as being within the twenty-fifth section of the Judiciary Act, which enacts that the final decree in the highest court of law or equity of a State, &c., where there is drawn in question the validity of an authority exercised under the United States and the decision is against the validity, or drawn in question the construction of any clause of a statute or commission held under the United States, and the decision is against the title specially set up by either party under such statute or commission, may be reviewed in this court.

Mr. *Wills*, for the defendant in error, now, and in advance of the case being regularly called, moved—the record being a short one, and of but ten pages—to dismiss the writ of error for want of jurisdiction.

He thus argued:

1. The State courts of California had no jurisdiction of the subject of the action. This court has held, in *Field* v. *Seabury* (19 Howard, 332), that the question of the validity of a patent for land is "a question exclusively between the sovereignty making the grant and the grantee." The courts of California, carrying out this doctrine, have held that "a patent imports absolute verity, and that it can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the authority of the government." (*Leese* v. *Clarke*, 18 California, 571; *Same* v. *Same*, 20 *Id.*, 423; see. also. *Beard* v. *Federy*, 3 Wallace, 479.)

2. It has been decided by the court in *Moreland* v. *Page* (20 Howard, 522), that this court has not jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the judgment of a State court, when the question involved relates to the proper boundary between two tracts of land, although the owners of both had valid grants from the United States.

Mr. Reverdy Johnson, for the plaintiff in error, *contra*, argued in support of the jurisdiction, contending, also, that the question, whether the jurisdiction did or did not exist, was one which the court would not settle in this preliminary way; that the question could not be settled without a thorough examination of the record; and that this could not be made until the case came up in regular order; that then, when the court would understand the whole matter, it could better decide the delicate matter of jurisdiction.

MR. JUSTICE GRIER delivered the opinion of the court.

In all cases of a motion to dismiss the writ of error for want of jurisdiction, the court must necessarily examine the record to find the questions decided by the State court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits.

In the case before us, the want of jurisdiction is patent; it requires no investigation of a long bill of exceptions; it was not decided by the court below on its merits, if it had any. It furnishes no reason for a postponement of our decision of the question.

If, in such cases, the court would postpone the consideration of the question of jurisdiction, we would put it in the power of every litigant in a State court to obtain a stay of execution for three years or more, by a frivolous pretence that it comes within the provisions of the twenty-fifth section of the Judiciary Act. In many States all the land titles originated in patents from the United States; and if every question of boundary, of descent, of construction of wills, of contracts, &c., and which may arise in State courts, may be brought here on the mere suggestion that the party against whom the State court gave their judgment, derived title under a patent from the United States, we should enlarge our jurisdiction to thousands of cases, and increase, unnecessarily, the burdens of this court, with no corresponding benefit to the litigant. It is plain that, in such cases, there is not "drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

We have here a very brief record, and, on the facts of the case, we cannot shut our eyes to the total want of jurisdiction, under the twenty-fifth section, or any other section of the Judiciary Act.

It is plain that, if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a State court, which did not decide that question, and refused to take jurisdiction of the case. The matter is too plain for argument. *Motion granted.*

VERDEN, plaintiff in error, v. COLEMAN.

December Term, 1861.—1 Black, 472; 4 Miller, 551.

Jurisdiction over Judgments of State Courts.

1. The defence to a mortgage foreclosure suit in a State court was, that to part of the land for which the mortgage was given the plaintiff

had no title, because the land for which he had a patent from the government had been assigned to an Indian under the treaty. This gives no jurisdiction, because the decision was in favor of the title set up under the United States.

2. The claim of the Indian's right under the treaty can only give jurisdiction when assailed by some one claiming under it, and not when set by a stranger. *Henderson* v. *Tennessee*, 10 H., 311, (18 Curtis, 405.)

WRIT OF ERROR to the Supreme Court of Indiana.

Mr. Gillet and *Mr. Mace* for plaintiff.

Mr. Baird for defendant.

MR. JUSTICE GRIER delivered the opinion of the court.

Does this case come within the 25th section of the Judiciary Act?

The bill filed in the State court is for the foreclosure of a mortgage. The defence set up by the mortgagor was the consideration of the note which the mortgage secured was the purchase-money of the land mortgaged; that the title to one of the tracts was through a patent of the United States to Hannamah Hewett: that this patent did not convey a good title, because in 1832 the United States concluded a treaty of purchase of a large tract of country with the Pottawatomie Indians; that by the terms of this treaty a section was reserved for an Indian named To-pen-na-be, to be located under direction of the President; that before the date of the patent to Hewett for this quarter-section the whole section, including it, had been assigned to To-pen-na-be.

The patent was, nevertheless, granted to Hewett because of a prior equity by settlement.

The Supreme Court of Indiana decided that the patent to Hewett was a valid grant of the land. This decision will not bring the case within the 25th section; nor can we claim it because of the title set up under the treaty with the Indians, because neither To-pen-na-be nor any one claiming under him is party to the suit.

This court has decided in the cases of *Owings* v. *Norwood*, 5 Cranch, 344, and of *Henderson* v. *Tennessee*, 10 How., 311, that "in order to give jurisdiction to this court the party must claim the title under the treaty for himself, and not for a third person in whose title he has no interest."

This case is, therefore, dismissed for want of jurisdiction.

ROBERT H. WYNN executor, &c., v. CHARLES B. MORRIS ET AL.

December Term, 1857.—20 Howard, 3; 2 Miller, 241.

Jurisdiction under 25th Section of the Judiciary Act.—Title to Land derived from United States.

1. In a writ of error to a State court, it must appear that the judgment of the court below was against the right, title, or claim asserted under the United States.
2. There is no jurisdiction where the plaintiff in error shows no such right, though the defendant in error asserts such a title, which is affirmed by the State court and contested by plaintiff in error. *Owings* v. *Norwood*, 5 Cr., 344; *Henderson* v. *Tennessee*, 10 How., 311.

WRIT OF ERROR to the Supreme Court of the State of Arkansas.

The case is stated in the opinion of the court.

Mr. Pike for plaintiff in error.

Mr. Watkins and *Mr. Bradley* for defendants.

MR. JUSTICE CATRON delivered the opinion of the court.

The complainant filed his bill in a State Circuit Court in Arkansas to enjoin Morris from executing a writ of possession founded on a recovery by an action of ejectment for the northwest quarter of section 18, in township 16, south of Red river.

Wynn alleges that the whole of the quarter-section was cultivated by him, and had been for years before the inception of Morris' title, and that he, Wynn, claimed title to the land through the State of Arkansas, and that Morris had obtained a legal title in fraud of Wynn's superior right in equity.

Morris claims through Keziah Taylor. In 1829 and 1830, when the occupant law of that year passed, she was a widow and cultivated a small farm on the land in dispute: she sold out her possessions there in the latter part of 1830, left the country secretly and settled permanently in the Mexican province of Coahuila and Texas, and there she remained without returning to Arkansas until December, 1842, when she made her appearance, proved her cultivation in 1829, and her continuing possession in May, 1830, in the form prescribed by the act of that year, had her pre-emption allowed, entered the land, and sold it to Morris. She got a patent in 1844.

The reason why Mrs. Taylor did not enter the land at an earlier day was, that the township No. 16 was not surveyed until 1841, and within one year before the date of her entry.

Wynn seeks a decree on the ground that Morris procured Mrs. Taylor to enter the land for Morris' benefit, when she had no right of pre-emption, because of the abandonment of her possession for more than ten years.

The register and receiver held that a preference of entry was vested by the act of 1830, and they refused to investigate the fact of abandonment. This opinion was concurred in by the Commissioner of the General Land Office. And to correct this alleged error the bill was filed. The State Circuit Court refused the relief prayed; adjudged that Mrs. Taylor obtained a valid title to the land, and decreed damages against Wynn for detaining the possession. From this decree he appealed to the Supreme Court of Arkansas, where the decree of the circuit court was affirmed, and to that decree Wynn prosecutes his writ of error out of this court; and the first question here is whether we have jurisdiction to re-examine and reverse or affirm the decree of the State courts. This can only be done in a case where is drawn in question the construction of a statute of the United States, &c., and the decision is against the title set up or claimed under the statute by the losing party. If Wynn had no title, of course he could not claim under a law of the United States, and cannot come here under the 25th section of the Judiciary Act of 1789, merely to draw in question the decree which dismissed his bill.

To this effect are the cases *Owings* v. *Norwood's Lessee*, (5 Cr., 344;) *Henderson* v. *Tennessee*, 10 How., 311.)

Wynn sets up a pretension of claim to the land in dispute through the State of Arkansas, which State was authorized to locate 500,000 acres of land by acts of Congress, passed in 1841 and 1842; and the complainant insists that he had made a contract with the State, through her locating agent, Charles E. Moore, who was acting under instructions from the governor of said State, to the effect that he, the complainant, should be allowed to purchase the land from the State at two dollars per acre. But the State did not locate this quarter-section, nor had it an interest in it at any time; so that the title was outstanding in the United States till Keziah Taylor made her entry.

The complainant, Wynn, having no interest in the land but a naked possession, not protected by an act of Congress, we order that his writ of error be dismissed for want of jurisdiction.

NOTE.—Same decision in *Hickie* v. *Starke*, 1 Peters, 94; *Fulton* v.

M'Affee, 16 Peters, 149; *Burke* v. *Gaines*, 19 Howard, 388; *Hale* v. *Gaines*, 22 Howard, 144; and *Ryan* v. *Thomas*, 4 Wallace, 603.

On questions of boundaries between grantees of the United States this court has no jurisdiction *Doe* v. *The City of Mobile*, 9 Howard, 451; *Moreland* v. *Page*, 20 Howard, 522; and *Laufear* v. *Hunley*, 4 Wallace, 205; nor upon partition of land acquired jointly from the government. *Downes* v. *Scott*, 4 Howard, 500.

Also see. *City of New Orleans* v. *Armas & Cucullu*, 9 Peters, 224; *Reed's Lessee* v. *Marsh*, 13 Peters, 153; *Udell* v. *Davidson*, 7 Howard, 769; *Doe* v. *Eslava*, 9 Howard, 421; *Walworth* v. *Kneeland*, 15 Howard, 348; *Shaffer* v. *Scudy*, 19 Howard, 16; *Mining Co.* v. *Boggs*, 3 Wallace, 304; *Rector* v. *Ashley*, 6 Wallace, 142; *Carpenter* v. *Williams*, 9 Wallace, 785; *Smith* v. *Adsit*, 16 Wallace, 185, an 1 23 Wallace, 368; and *McStay et al.* v. *Friedman*, 2 Otto, 723

Also see the following cases in which jurisdiction was held. *Matthews* v. *Zane*, 4 Cranch, 382, and 7 Wheaton, 164; *Mackay* v *Dillon*, 4 Howard, 421; *Lessieur* v *Price*, 12 Howard, 59; *Cousin* v. *Labatut*, 19 Howard, 202; *Maguire* v. *Tyler*, 1 Black, 195, and 8 Wallace, 650; and *Silver* v. *Ladd*, 6 Wallace, 440.

A cause being before the supreme court upon a second writ of error the court, under the Judiciary Act, may, at their discretion, remand the cause a second time or "proceed to a final decision of the same and award execution" *Tyler* v. *Maguire*, 17 Wallace, 253.

LITCHFIELD *v.* THE REGISTER AND RECEIVER.

December Term, 1869. —9 Wallace, 575.

1. The rule established in *Gaines* v. *Thompson*, 7 Wallace, 347, that the courts will not interfere by mandamus or injunction with the exercise by the executive officers of duties requiring judgment or discretion, affirmed and applied to registers and receivers of land offices.
2. The fact that a plaintiff asserts himself to be the owner of the tract of land which these officers are treating as public lands, does not take the case out of that rule, where it is the duty of these officers to determine upon all the facts before them, whether the land is open to pre-emption or sale.
3. In such cases, if the court could entertain jurisdiction against the land officers, the persons asserting the right of pre-emption would be necessary parties to the suits.

APPEAL from the Circuit Court for the District of Iowa.

Litchfield filed his bill in the court below against Richards, register, and Pomeroy, receiver of the United States land office at Fort Dodge, Iowa, asking an injunction to restrain them from enter-

taining and acting upon applications made to them to prove pre-emptions to certain lands which lay within the land district for which they were respectively register and receiver. The bill, which was very full, recited the various acts of Congress and of the State of Iowa, by which the complainant maintained that a large list of tracts of land, supposed to belong to an original grant to the Territory of Iowa for the purpose of improving the navigation of the Des Moines river, became his property. The history of that grant has been recently the subject of report in these volumes in several cases, and it is unnecessary to repeat it. It is sufficient to say that the bill giving that version of the matter which was favorable to the title of the complainant, averred that he was the legal owner of the lands; that they were not public lands, and were in no manner subject to sale or pre-emption by the government, or its officers. The defendant demurred, and the bill was dismissed for want of equitable jurisdiction. Whereupon the complainant appealed.

Mr. Litchfield, the complainant, insisted that the facts as stated in the bill must be taken as confessed by the demurrer, and that they showed that the land officers were exceeding their authority, and would give certificates of pre-emption and entry, which would cloud and embarrass his title, and that they should, therefore, be restrained.

Mr Kelsey contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The principle has been so repeatedly decided in this court, that the judiciary cannot interfere either by *mandamus* or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines* v. *Thompson*, (7 Wallace, 347), decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary* v. *McGarrahan*, of the present term, (9 Wall., 298), reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the land department.

It is insisted, however, by the complainant, that the present case

does not come within the rule so laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption, and grant certificate of entry. There are within that district, of course, lands open to sale and pre-emption. There would be no use for the land office if there were not.

The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion.

The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then in the appropriate proceedings determine who has the better title or right. To interfere now; is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

Another objection, equally fatal to the bill, is the want of necessary parties.

It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to pre-empt these lands. These persons are the real parties whose interest are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defence, and thus a proceeding almost exparte be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court. *Decree affirmed.*

NOTE.—1. The same doctrine held in *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 2 Wheaton, 369, and 6 Wheaton, 598; *United States* v. *The Commissioner*, 5 Wallace, 563; *Walker* v. *Smith*, 21 Howard, 579, and *Castro* v. *Hendricks*, 23 Howard, 438.

ALEXANDER LEVI *v.* JOHN THOMPSON ET AL.

December Term, 1845.—4 Howard, 17; 16 Curtis, S.

The title acquired by a register's certificate, upon which a patent issues, is such an equitable title as was liable to be levied on by the law of Iowa [1]

The commissioners under the act of the 3d of March, 1837 (5 Stats. at Large, 178), amendatory of the act entitled "An act for laying off the towns of Fort Madison," &c., approved July 2, 1836 (5 Stats. at Large, 70), confirmed unto Alexander Levi and John Thompson, as tenants in common, the right of purchase, by pre-emption, of lot No. 68, in the town of Dubuque, being of the first class, containing seventeen one-hundredths of an acre. The lot was entered in the land office, and the receiver's receipt given to Levi and Thompson for the purchase-money on the 1st of April, 1840. It appears that William Chilson and Joel Campbell had instituted

a suit, on the common law side of the District Court of Dubuque county, against Levi and Thompson, and that judgment was rendered against them for $780.50 and costs of suit in August, 1839. Execution was issued upon the judgment in due form of law; it was placed in the sheriff's hands to be executed, and he levied upon the lot for which Levi and Thompson had a pre-emption certificate, and the same was sold to satisfy the execution before a patent had been issued by the United States to Levi and Thompson for the same. Thompson, the tenant in common with Levi, became the purchaser, paid the purchase-money, and took the sheriff's deed for the same. Thompson, in November, 1841, sold the lot to the other defendants, who had paid for the same before Levi sued out his bill. They state, in their answer to Levi's bill, that when they bought the lot from Thompson they were informed by him, and so supposed the fact to be, that he had a full and perfect right thereto, free from all incumbrances, and of all claim by any other person or persons, and that at the time of their purchase, and when they made the payments to Thompson for the same, they were utterly ignorant of any title or claim to property in Levi, or that he set up or pretended to have any claim or title to the same; that the first notice they had of any such claim by Levi was about three weeks before the date of their answer to his bill, when he sent them word that he desired them to make a division of the property with him. They further state at the time of their purchase there was a small log-house upon the lot, of little or no value to them, which they tore down and removed: that they went into quiet and peaceable possession of the lot at the time of their purchase, and have so remained ever since; that they had made lasting and valuable improvements upon the lot; that for a considerable part of the time whilst they were making these improvements, Levi had been in the city of Dubuque, and they believe must have discovered them, as he frequently passed and repassed the lot, and never informed them of his having any claim to the same. The cause was tried in the district court, upon the bill and answers of the defendants, and the court adjudged that the petition of the complainant should be dismissed. An appeal was taken to the Supreme Court, and that court affirmed the decree of the court below, and from that court it has been brought to this court by appeal.

Washington Hunt for the appellant.

Davis and *Crawford* for the appellees.

WAYNE, J., delivered the opinion of the court.

The only question raised by the pleadings in this cause, and it seems to us the only one argued at its hearings in the District and Supreme Courts of Iowa, was whether the lot, for which Levi and Thompson had a pre-emption certificate, which had been entered and paid for by them, was or was not liable to be sold upon execution issued upon a judgment rendered against them previous to a patent having been issued for the land by the government of the United States. Their right to a pre-emption purchase of the lot was acquired under the act of the 2d of July, 1836, c. 262, entitled "An act for laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Bellevue, Dubuque, and Peru, in the county of Dubuque, Territory of Wisconsin, and for other purposes," and under the act of the 3d of March, 1837, c. 36, amendatory of the preceding act just recited. The right of Levi and Thompson to a pre-emption under those acts is not a controverted point in the case. Taking it for granted, then, that it had been lawfully acquired, that they entered the land in the proper office, and that it was paid for in their names, this gave them the right to the register's certificate of purchase, to be transmitted to the Commissioner of the General Land Office, as in other cases of the sale of public lands. The fee continues in the United States until the issue of the patent, but the right to the fee was in the purchasers, and they were entitled to a patent for the land, unless there was some legal objection by the United States against issuing it, of which this court is not advised.

This right to the fee and a patent in this case gave to Levi and Thompson that "equitable right" to the land, under the certificate from the receiver of the land office, which the law of Iowa has made subject to execution for the satisfaction of judgments. (Stat. Law Ter. of Iowa, 197, January 25, 1839.)

We further remark that the principle upon which the case of *Carroll* v. *Safford*, 3 How., 441, was decided, covers this case. Nor do we find anything in the case of *Bagnell* v. *Broderick*, 13 Pet., 436, or of *Wilcox* v. *Jackson*, 13 Pet., 498, 516, 517, cited by the counsel for the plaintiff in error, or in any other case decided by this court, which conflicts with the decision it here gives.

We direct the decree of the court below to be affirmed.

NOTE.—1. By a valid entry an interest in the land is acquired that may be levied upon and sold, under execution. *Fulkner* v. *Leith*, 15 Ala., 9;

Byers v. *Neal*, 43 Cal., 210; *Jackson* v. *Spink*, 59 Ill., 404. A judgment then becomes a lien on the land entered. *Robertson* v. *Wood*, 5 La. Ann., 197; and in equity this lien cannot be defeated by the purchaser assigning the certificate of entry, and having the patent issue in the name of such assignee. *Huntington* v. *Grantland*, 33 Miss., 453; also, in law the purchaser at the sheriff's sale may maintain an action of ejectment against the patentee. *Rogers* v. *Brent*, 5 Gill (Ill.), 573.

In case the certificate of entry is assigned before judgment, then no lien could attach, as the assignment passed the title to the land, and a sale under such judgment would pass no title, although the assignment was not recorded. *Martin* v. *Nash*, 31 Miss., 324.

A certificate of entry may be assigned as collateral security, and such assignment will be an equitable lien on the land described in the certificate. *Wallace* v. *Wilson*, 30 Mo., 335; *Storer* v. *Bounds*, 1 Ohio St., 107.

No implied warranty of title to the land attaches to the assignment of a certificate of entry. *Johnson* v. *Houghton*, 19 Ind., 359.

The assignment of the certificate of entry passes the equitable title to the land, and a patent issued to the person who made the entry, and a sale of the land by him cannot defeat this equitable title. *Sillyman* v. *King*, 36 Iowa, 207; also, see *Falkner* v. *Jones*, 12 Ala., 165.

If an assignment of a certificate of entry be obtained by fraud, a court of equity may order the cancellation of such assignment. *Phillips* v. *Moore*, 11 Mo., 600.

If the holder of a certificate of entry execute a title bond for a conveyance of the land, and afterward assign the certificate of entry, the assignee will hold the legal title, in trust for the holder of the title bond. *Cupps* v. *Irvin*, 2 Blackf. (Ind.), 112.

EDWARD S. WILSON *v.* ALEX. L. BYERS ET. AL.

Supreme Court of Illinois, January Term, 1875.—77 Illinois, 76.

1. *Mistake: Correcting a patent for land entered.*—Where a party entered a quarter of land in township 4 north of a base line, and, being unable to complete the payment, attempted to relinquish the east half thereof, but, by mistake, the quarter was described as in township 4 south, and a patent was issued to his assignee for the west half of the tract so entered, describing it as in township 4 south, instead of 4 north, and possession was taken, at the time, of the right tract, and continued until it was entered and purchased of the United States by the defendant, it was *held*, on bill filed to correct the mistake, etc., that the complainant holding under the original purchaser was entitled to have the mistake corrected, and compel the defendant to convey the legal title to them.
2. *Same: Must be mutual.*—Where a mistake is alleged in the patent from the United States for a tract of land, it is not sufficient to show a mis-

take in the application of the patentee, but it must be shown that the mistake was mutual, and that the land officers, in selling, intended to have sold the tract claimed.

3. *Laches: Not imputed to one in peaceable possession.*—*Laches* cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of the premises in any of the conveyances, through which he deduces title. His possession is notice to the world of his equitable rights, and he need not assert them until he may find occasion to do so.

4. *Trust: When party acquiring legal title will be declared a trustee for the equitable owner.*—Where a certain tract of land is in fact purchased of the United States, but the same is misdescribed in the patent issued therefor, and a party, having notice by actual possession of those claiming under the purchaser, acquires the legal title to the land from the government, it will be held in fraud of the rights of the equitable owners, and he will be regarded as holding the legal title in trust for them.

APPEAL from the Circuit Court of Jasper County.

The Hon. JAMES C. ALLEN, Judge, presiding.

Messrs. Wilson & Hutchinson for the appellant.

Messrs. Robinson, Knapp & Shutt, and *Mr. Finney D. Preston* for the appellees.

MR. JUSTICE SHELDON delivered the opinion of the court.

The bill in chancery in this case charged that, about April 20, 1820, one David Rawlings applied at the Shawneetown land office, in this State, to enter the whole of the southeast quarter of section 34, township 4 north of the base line, range 10 east of the third principal meridian, and paid the partial payment thereon then permitted by law; that afterwards, being unable to pay for the whole of said tract, he relinquished to the United States the east half of the quarter-section, retaining the west half; that he assigned his certificate of entry to one James Elliott, who completed the payment for said west half, received a certificate of purchase therefor, and which passed into a patent from the United States to James Elliott, as assignee of David Rawlings, in which patent the land is described as being in township number 4 *south*, instead of *north* of the base line; that Elliott afterward sold and conveyed the tract to one Thomas W. Lilley, describing correctly in the deed the land as the west half of the southeast quarter of section 34, township 4 *north*, range 10 east, etc., that in 1841, Lilley platted part of this tract in town lots, which are now part of the

town of Olney, and sold and conveyed several of the lots to the complainants; that in February, 1871, Edward S. Wilson, the defendant, procured patents from the United States to said west half of southeast quarter of section 34, township 4 north, range 10 east, etc., and claims to own the same; that the patent of Wilson constitutes a cloud on complainants' title, and prays that Wilson be ordered to convey to them, etc.

The court below, on hearing upon proofs, decreed the relief prayed, and defendant appealed from the decree.

It is conceded by appellant's counsel that the entry of and payment for public land give better title, in equity, than a subsequent patent to another person. The important question in the case, then, and the only real subject of dispute, is one of fact. What tract of land did David Rawlings buy, or intend to buy, of the United States; and, also, what tract did the United States sell to him?

The cause was heard below upon an agreed statement of facts, in addition to the documentary testimony, and the depositions of Alexander and Keefer, former registers of the Palestine and Springfield land offices.

It appears that the original application by David Rawlings to enter land April 11, 1820, and the certificate of such entry then issued to him at the Shawneetown land office are lost: that Michael Rawlings, father of David Rawlings, settled with his family on the west half southeast quarter-section 34, township 4 north, range 10 east, third principal meridian, in the fall of 1820; built a house thereon and resided in it, and inclosed part of the tract. His son David lived with him in his family. They lived there till the spring of 1823, when Michael Rawlings sold said tract to James Elliott, who moved into the house and took possession in the fall of 1823, and made additional improvements thereon. Elliott lived there until 1837, when he sold and conveyed the said tract to Thomas W. Lilley, describing it correctly in his deed. Lilley took possession and enclosed the whole tract, and lived on the same until his death in 1869. He platted part of it as an addition to Olney, and many of the lots had been sold by him, among which are those claimed by complainants. Lilley's widow continues to occupy part of said land as her homestead. Since their purchase, complainants have been in actual possession of their lots, and have erected buildings on them.

Clark D. Stillwell, on September 24, 1854, obtained a certificate

of entry, at the Shawneetown land office, for the northwest quarter of southeast quarter of section 34, township 4 *south*, range 10 east, third principal meridian, and went on the same in 1855, made some improvements, and has since sold and conveyed said tract to Joseph P. Stillwell. This certificate was, however, canceled June 12, 1855, by the Commissioner of the General Land Office, as interfering with a previous sale of the west half of the quarter to David Rawlings, April 11, 1820.

White county, in which the west half southeast quarter 34, 4 *south*, 10 east, third principal meridian is situated, has sold and conveyed to Joseph P. Stillwell the southwest quarter of southeast quarter 34, 4 *south*, 10 east, third principal meridian, it having been previously vested in the county as swamp land, under the act of Congress granting the swamp lands; since which sale by the county, both said forties in southeast quarter 34, township 4 south, have been occupied by said Stillwell and his grantees, who have improved the same.

The west half southeast quarter 34, 4 south, 10 east, third principal meridian, was wild and unoccupied land prior to Stillwell's entry in 1855.

Neither Michael Rawlings, David Rawlings, nor James Elliott, ever lived on said last tract of land, or claimed title to it, or lived in White county. Edward S. Wilson, the defendant, is a lawyer of several years' practice, and has been engaged in abstracting titles to land in Olney, and has lived there several years.

From the above-recited facts, there can be no doubt what land Rawlings intended to purchase, and supposed he had purchased, and what land Elliott, as his assignee, intended to complete the purchase of, and supposed he had done so; that it was the eighty-acre tract in 4 *north;* and that the defendant was chargeable with constructive notice of whatever equitable rights they and the complainants had thereto.

But this, of itself, is not enough. The mistake to be relieved against must have been mutual, and the land officers making sale of the land as well must have intended to sell this same tract. Rawlings might have made a mistake in his original application to enter the land, and have wrongly described it as in 4 *south;* but this original application is lost, as well as the certificate of the entry issued to him, and we have to look to the official records of the land offices for evidence upon the point.

We may first say that, in 1820, when this entry was made, the

United States was selling its lands at $2 per acre, one-fourth of the purchase money being required to be paid in cash at the time of the entry, and the balance in annual payments.

We have then in evidence an extract from ledger D, of the register's land office, Shawneetown land office, where we find that on April 11, 1820, is recorded the fact that on that day "David Rawlings, of Edwards county, Illinois, bought the S. E. ¼ of Sec. 34, in township No. 4 N., R. 10 E., for $320;" that on the same day he is credited, "by cash $80." In this entry the letter "N." after the township, is in red ink, and appears above the line of the rest of the entry. This is a suspicious circumstance, and renders it unsatisfactory what the original entry was.

We have next the following:

"RECEIVER'S OFFICE, AT SHAWNEETOWN,
"ILLINOIS, 11*th April*, 1820.

"*Sundries, Dr.—To sales of public lands:*

"David Rawlings, for purchase money of S. E. ¼ of Sec. 34, T. 4 N., R. 10 E., 160 acres, purchase 11th April, 1820. . . $320."

"*Cash Account, Dr.—To Sundries:*

"To David Rawlings, for first installment of purchase money of S. E. ¼, Sec. 34, T. 4 N., R. 10 E., purchased 11th April, 1820, per receipt 7048. . . . . $80."

This is a record from journal F, of the receiver's office, of the Shawneetown land office, dated 11th April, 1820.

We have then the following:

"1820, 11th April—7048—David Rawlings—1—80—S. E. 34—4 N—10 E—160."

This extract is from a book in the register's office, of said land office, marked "Registry of Receipts," and is the record kept by the register of the receipts given by the receiver, and shows that on the 11th of April, 1820, David Rawlings had presented to him for registry the receipt of the receiver for first payment of $80 for the southeast quarter of 34, township 4 north, range 10 east, 160 acres, and that said receipt was number 7048.

These last two entries in the receiver's and register's books are unexceptional in appearance, there being no suspicious circumstance of alteration whatever connected with them.

The above exemplifications from the records of the Shawnee-

town land office constitute all the entries on any of said books relating to this tract of land from April 11, 1820, until June 25, 1829.

On the day last named, James Elliott, assignee of David Rawlings, completed the entry of Rawlings, in accordance with an act of Congress then in force, by relinquishing to the United States the east half of the quarter-section, describing it, as the record shows, as in 4 *south*, and paying the balance due for the west half, and receiving therefor Shawneetown final certificate number 1150, which also describes the tract as in 4 *south*. It, however, also describes the tract as purchased by David Rawlings, April 11, 1820, and that Elliott, his assignee, has completed payment of it. The entries of the transaction in the journals of both the receiver's and register's offices of the Shawneetown land office, under date of June 25, 1829, describe the tract as in 4 *south*, and the patent to Elliott describes it as in 4 *south*. There is no doubt, from the evidence, that, by the records of the General Land Office at Washington, the west half southeast quarter 34, township 4 *north*, range 10 east, third principal meridian, at this last date and afterward, appeared to be vacant. The commissioner of that office informed the register and receiver of the local office, by letter of February 11, 1870, that it so appeared, and directed them to hold the same subject to entry, etc.; but there is no exemplification in evidence of any record from the General Land Office, except that of Elliott's relinquishment and his final certificate, number 1150. There is no evidence as to Rawlings' original certificate.

After the entry by Rawlings, April 11, 1820, the Palestine land district was created from territory of the Shawneetown land district, and the tract in 4 *north* of the base line fell in the former district, the south line of the Palestine district being the base line, and that line being the north boundary of the Shawneetown land district.

The Palestine land office was opened in the fall of 1820. As the entry by Rawlings was at Shawneetown land office, and at the time this tract in 4 *north* was in that land district, Elliott had to complete the purchase at the Shawneetown office.

The plat books and the tract books of both these offices furnish further evidence that it was the tract in 4 *north* which Rawlings purchased, and Elliott, his assignee, completed payment for.

On the plat book of the Shawneetown land office there is no

entry of the purchase by Rawlings of the southeast quarter of this section in township 4 *south*, but, on the contrary, the first entry thereon was the noting on the northwest quarter of southeast quarter of 34, 4 *south*, of the entry of that by Clark D. Stillwell, September 2, 1854, and indicated on the plat by the figures 21,236," that being the number of Stillwell's certificate. No other entry appears on said plat book until, in pursuance of an order from the Commissioner of the General Land Office, the register of the Shawneetown land office was directed to make entry of approved list number 1 of swamp lands, opposite each of said tracts, on his books, of the words "swamp land act. September 28, 1850; approved May 19, 1855, in list 1." In this list of swamp lands are south half southeast quarter 34, 4 south, 10 east, third principal meridian, and northeast quarter southeast quarter 34, 4 south, 10 east, third principal meridian. This the register complied with by noting on said plat book, on said swamp land tracts, the words, "State, act 28th September, 1850," and also by entering on the tract book the above words ordered to be inserted by said commissioner; and thus, with the Stillwell entry, completing the disposition of the whole quarter section *south* of the base line. Upon the tract book of the Palestine land office there was the following original entry upon the plat of this tract: "W. H. S., E. 34, 4, 10, David Rawlings, S. T. Cert. 1150;" the above abbreviations standing for west half southeast quarter-section 34, township 4, range 10, the letters "S. T. Cert." meaning Shawneetown certificate, and the figures 1150 the number of the final certificate under which the entry was concluded.

On the plat of the tract upon the plat book of the Palestine land office was the following original entry: "S. T. 1150."

If the tract which Rawlings applied to enter, and Elliott concluded the entry of, were in township 4, *south* of the base line, these entries should not appear on the books of the Palestine land office, as it only had to do with lands lying north of the base line.

So, too, had the tract been in 4 *south*, the fact of the entry should have been noted on the plat book of the Shawneetown land office, and said book should not have remained wholly blank respecting this quarter-section, until in 1854, when the entry of the northwest quarter of it by Clark D. Stillwell is noted by the figures 21,236, and subsequently the grant of the remainder as swamp land to the State, is noted upon it.

These original entries upon the Palestine office plat and tract

books were subsequently, in 1870, at the time of Wilson's entry, erased by the deputy register of the land office at Springfield—to which latter office, in 1855, or 1856, all books and papers of all the other land offices in the State were sent, and they closed, in correction of a supposed mistake; and an entry of Wilson's purchase was made instead.

It is needless to enlarge upon the evidence. It is palpable, from the proofs furnished by the books of the Shawneetown and Palestine land offices, that the tract which the land officers intended to and did sell to Rawlings, April 11, 1820, and which they received final payment for from Elliott, Rawlings' assignee, June 25, 1829, was the west half of southeast quarter-section 34, township 4 *north* of the base line, of range 10 east of the third principal meridian, and that in Elliott's relinquishment, Shawneetown final certificate number 1150, and patent, there was a mistake made in the description of the tract, describing it as in 4 *south* instead of 4 *north*.

It is insisted that Elliott has not paid for the tract in full, because it was in part paid for by Elliott's relinquishment of the east half of southeast quarter 34, township 4 *south*, range 10 east, etc., and Elliott had no title to that; but it was the east half southeast quarter 34, township 4 north, etc., which was actually relinquished by Elliott, there being a mistake in describing it as in 4 *south*.

It is insisted, too, that there has been such *laches* as should bar the claim for relief.

Laches cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. (*Mills* v. *Lockwood*, 42 Ill., 112.) The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.

The tract was purchased by Wilson, with "Poterfield" scrip, which was worth $5 per acre, because applicable to unoffered lands: and it is insisted that it was erroneous to compel Wilson to convey to complainants the rights held by him under this scrip; that it was an appropriation of this scrip to complainants' use, without consideration; but Wilson purchased the land with notice and in consequent fraud of the rights of the complainants or their grantor, and held the title which he acquired but as their trustee.

Whatever the sum he might have paid for the land, it would in nowise affect complainants' right to a conveyance of the legal title.

The decree will be affirmed.

Decree affirmed.

NOTE.—The fact that the application number was written on the plat in the local land office on the quarter-section claimed to have been entered, or intended to have been entered, and the payment of taxes for several years on such tract, by the purchaser, who afterwards sold the land, is not sufficient evidence of a mistake in the entry as to offset the fact that the written application to enter, the certificate and receipt, as well as the tract book, all show the entry of another tract. *Iowa R. R. and Land Company* v. *Adkins*, 38 Iowa, 351; also, see *Sensenderfer* v. *Smith*, 66 Mo., 80.

EVARISTE BLANC, plaintiff in error, *v.* GEORGE W. LAFAYETTE and JOHN HAGAN.

December Term, 1850.—11 Howard, 104; 18 Curtis, 565.

The act of May 11, 1820 (3 Stats. at Large, 573, § 1), did not confirm a claim to land in Louisiana, which was inserted in the report of the register and receiver, and therein classed among claims which had already been confirmed, though, in point of fact, this claim had not then been confirmed.

ERROR to the Supreme Court of Louisiana. The material facts appear in the opinion of the court.

Bullard for the plaintiff.

Jannin, *contra*.

WAYNE, J., delivered the opinion of the court.

The plaintiff in error having claimed the land in dispute under an act of Congress, and the construction of that act by the Supreme Court of Louisiana having been against the claim, the case is brought here under the twenty-fifth section of the Judiciary Act of 1789 (1 Stats. at Large, 85), to have the opinion given in that court reviewed by this tribunal.

The question presented is, whether or not the claim of Louis Liotaud, for a tract of land situated in the eastern district of Louisiana, was confirmed by the act of Congress of the 11th of May, 1820 (3 Stats. at Large, 573), against any claim to the land

by the United States, so that an entry could not be made upon it in favor of Major General Lafayette.

The plaintiff in error claims under Liotaud. That claim will be found in 3 American State Papers, Public Lands, 224.

It is, "that Louis Liotaud claims a tract of land, situated in the county of Orleans, on the left bank of the canal Carondelet, leading to the bayou St. John, containing six arpens in front, and forty in depth, and bounded on one side by lands granted by the Spanish government to Carlos Guardiola, and on the other side by vacant lands. This tract of land is claimed by virtue of an order of survey dated in the year 1802." This memorandum is found in the report of the commissioner for ascertaining and adjusting claims to land in the eastern district of the State of Louisiana. It was transmitted to Congress on the 16th of January, 1817, by Josiah Meigs, the General Land Commissioner. (3 American State Papers, Public Lands, 222.)

The claims were divided into three general classes:

1. Such as stand confirmed by law.

2. Those which the register and receiver thought ought to be confirmed.

3. Such claims as, in their opinion, could not be confirmed under existing laws.

The first class comprehended three species of claims: 1. Such as were founded on complete titles, granted by the French or Spanish governments. 2. Claims resting upon incomplete French or Spanish grants or concessions, warrants, or orders of survey, granted prior to the 20th of December, 1803. 3. Claims rejected by a former board of commissioners, merely because the lands claimed were not inhabited on the 20th of December, 1803.

Liotaud's claim is put by the register and receiver in the second species. (3 American State Papers, Public Lands, 224.)

This report was acted upon by Congress. It declared that "the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the Commissioner of the General Land Office, bearing date the 20th of November, 1816, and recommended in the said report for confirmation, be and the same are hereby confirmed, against any claim on the part of the United States." (Act of May 11, 1820, c. 87, § 1, 3 Stats. at Large, 573.)

The register and receiver had said in their report that all the claims included under the second species of the first class were

already confirmed by the act of Congress of the 12th of April, 1814. (3 Stats. at Large, 121.) In this they were certainly mistaken, as they were also in placing Liotaud's claim in what was termed, in their report, the second species of the first class of claims.

The record does not contain a copy of the order of survey in favor of Liotaud, mentioned by the register and receiver, dated, as they say, in the year 1802. Nor is there in it either of those documentary papers, uniformly given by the intendants general of Spain, when grants of land were made. We have not before us either a grant or order of survey in favor of Liotaud. Nothing to make the claim an inchoate right upon which a title could be enlarged in favor of Liotaud. Indeed, we do not know anything from the record about it, and all that we do know of the claim is the memorandum of the register and receiver already recited. That discloses that the order of survey mentioned had been given after the cession of Louisiana by His Majesty to the republic of France.

Register Harper and Receiver Lawrence say, in their report, that Liotaud's claim is founded on an order of survey dated in the year 1802. Apart from the consideration that the order for a survey is dated after the time when Spain had parted with her political sovereignty to grant land in Louisiana, there is no proof of anything having been subsequently done by Liotaud, or by any official of Spain, to give to Liotaud even an inchoate equity to the land. The claim, then, could not be rightfully, nor was it understandingly, put by the register and receiver under the second species of the first class of claims of incomplete French or Spanish grants or concessions, warrants, or orders of survey, granted prior to the 20th of December, 1803.

Liotaud's claim having been mistakenly put where we find it, it is neither within the letter nor the intention of the act of the 11th of May, 1820, confirming titles to land described by the register and receiver. Congress meant to confirm claims to land under some documentary right from France or Spain, and not claims by persons without any such proof. Liotaud's claim, then, under which the plaintiff in error asserts his right, does not interfere with the patent for the same land issued by the United States in favor of Major General Lafayette. It is admitted in the case that the defendants in error have acquired the rights of General Lafayette to the lands in dispute. All of us think that there was no error in the judgment of the Supreme Court of Louisiana, and its judgment is *Affirmed.*

DAVID *v.* RICKABAUGH ET AL.

Supreme Court of Iowa.—December Term, 1871.—32 Iowa, 540.

Registry Laws: *Public Lands.*—It seems that the registration laws of the State do not apply to the disposition of lands belonging to the United States, and that the rights of parties will be governed by the regulations established by Congress until the title has finally passed from the government.

Appeal from Mills District Court.

FRIDAY, *December* 8.

The petition states that in 1854 the plaintiff and the banking firm of Green, Thomas & Co., of Burlington, Iowa, jointly employed W. L. Hamilton to select and enter, for them and on their account, western lands of the United States, furnishing him with the necessary funds and land warrants; that on the 20th day of October, 1854, said Hamilton, with the funds thus furnished to him, entered at the Council Bluff's land office three of the forty-acre tracts of the land in controversy in his own name, and some time thereafter entered the other forty in the same manner, paying for the same with the funds thus furnished; that the certificates of such entries were assigned by Hamilton before patents were issued thereon to Edward H. Thomas, one of the partners in the firm of Green, Thomas & Co., which assignments were duly acknowledged before the register of the land office; that on August 23, 1858, upon a settlement and division between the plaintiff and Green, Thomas & Co., said E. H. Thomas conveyed to the plaintiff, among other lands, these four forty-acre tracts by quit-claim deed, which was duly acknowledged and recorded; that the plaintiff has ever since paid the taxes and exercised complete ownership over the same; that by some accident the patents for three of the forties were not issued in the name of Thomas as they should have been, but in the name of said Hamilton, that for the other forty being correctly issued in the name of E. H. Thomas, assignee.

The petition further states that in September, 1867, Hamilton and Rickabaugh, conspiring together to defraud the plaintiff, the said Hamilton, pretending to be the owner of said lands, conveyed the same by deed of general warranty to Rickabaugh, and that the latter had actual knowledge of plaintiff's ownership.

Issue being joined, the cause was referred upon the pleadings, exhibits and depositions, and the report of the referee is to the

effect that all the averments of the petition are true, except that Rickabaugh had not sufficient actual notice of plaintiff's title to be put upon inquiry.

His conclusions of law are:

1. That plaintiff is entitled to a decree quieting the title in him to the forty, the patent for which was issued in the name of E. H. Thomas.

2. To a judgment for the amount of the unpaid purchase-money due from Rickabaugh on his purchase from Hamilton.

3. That Rickabaugh is entitled to a decree for the other three forties, patented in the name of Hamilton.

4. That the costs should be apportioned among the parties.

Exceptions were filed by both parties, which were overruled by the court, and a decree entered in accordance with the referee's report. Plaintiff appeals.

Watkins & Williams and *Halls & Baldwin* for the appellant.

D. H. Solomon for the appellees.

MILLER, J.:

I. In addition to the facts found by the referee the evidence shows that the patents were never delivered to Hamilton, but remained in the possession of the United States until they were delivered to the plaintiff, in 1865, upon the surrender by him of the certificates of entry, and have remained in his possession ever since.

As to the correctness of the first part of the decree, quieting the title in plaintiff to the forty-acre tract, patented in the name of E. H. Thomas, and conveyed by him to the plaintiff, which conveyance was duly recorded prior to Rickabaugh's purchase from Hamilton, there can be no question, nor is any question made thereon, as the defendants do not appeal therefrom.

II. The appellee bases his right and title upon the following facts: .1. By the copies of original entries filed in the office of the recorder of deeds it appears that W. L. Hamilton, his grantor, was the original purchaser from the United States of the land in controversy. 2. That there was no conveyance of the land from Hamilton of record. 3. That appellee had no actual notice of plaintiff's title or claims to the land.

The rights of the parties must be determined in the main by the laws of the United States. While the State has an undoubted right to legislate as she may please in regard to the remedies to be prose-

cuted in her courts, and to regulate the disposition of property of her citizens by descent, devise or alienation, yet in respect to the public domain of the United States, of which the land in dispute was a part, Congress is invested by the federal constitution with the power of disposing of and making all needful rules and regulations respecting it. (*Wilcox* v. *Jackson*, 13 Pet., 498; *Irvine* v. *Marshall*, 20 How., 553.) So that, in respect to the disposition of the public lands, we must be governed by the regulations established by Congress touching the same, until the title has finally passed from the government, and until conveyed by its grantee.

We find that, under these regulations, "when an individual applies to purchase a tract of land, he is required to file an application in writing therefor; on such application the register (of the land office) indorses his certificate, showing that the land is vacant and subject to entry, which certificate the applicant carries to the receiver, and is evidence on which the receiver, permits payment to be made, and issues his receipt therefor. The duplicate of this is handed to the purshaser, as evidence of payment, and which should be surrendered when a patent, forwarded from the General Land Office, is delivered to him. The other receipt is handed to the register, who must immediately indicate the sale on his township plat, and enter the same on his tract book, and is transmitted to the General Land Office, with the monthly abstract of sales and certificate of purchases." (See circular of instructions by General Land Office, issued in 1831.)

The entry of lands with military land warrants is required to be made by application to the register alone, who issues certificates of purchase made according to forms furnished by the General Land Office, one of which is delivered to the purchaser, and another is retained to be sent to the commissioner. (See *Bell* v. *Hearne*, 19 How., 260.)

By act of Congress of March 22, 1852, the certificates of locations of military land warrants were made assignable, subject to regulations and forms prescribed by the Commission of the General Land Office, and when assigned the patent issued to the assignee.

In this case the land was entered with military land warrants by Hamilton, who was a mere agent for that purpose. He made the entries, however, in his own name; subsequently he assigned the certificates to Thomas. Before doing so he held the mere

naked title (such as the certificates could give) in trust for his principals. After assigning the certificates he had no title whatever in the land. The assignee became entitled to patents for the land in his own name, and that they were not so issued, was the result of mistake or omission.

When Thomas became the owner of the land by assignment of the certificates, there was no act of Congress or even of this State which required him to record the evidence of his title, nor has there been at any time since any law to that effect.

Thomas, therefore, could, at any time after thus obtaining all the title vested by the certificates, even before the issuance of patents, have conveyed the land by deed, as he did to David. (*Cavender* v. *Smith*, 5 Iowa, 189; *Arnold* v. *Grimes*, 2 *Id.*, 1; see, also, 2 Washb. on Real Property, 544, 545, and cases cited in notes 1 and 2.)

The deed from Thomas to the plaintiff vested in the latter the title, to the same extent that it could have been held under the certificates of entry by an original enterer. Up to the time of the conveyance by Thomas to David no question of notice under the recording laws of the State was involved. (See *Arnold* v. *Grimes*, 2 Iowa, 19; *Heirs of Klein* v. *Argenbright*, 26 *Id.*, 497, which support the principle here enunciated.)

The deed from Thomas to the plaintiff was duly recorded prior to Rickabaugh's purchase from Hamilton. The plaintiff complied with the recording laws at once when those laws became applicable and affected his rights. No record of any transfer of the ownership of the land, prior to the execution and delivery of the deed to plaintiff, was necessary to protect his rights. No law required him to record the certificates of entry and Hamilton's assignments thereof. The recording of his deed from Thomas was constructive notice to Rickabaugh that the plaintiff claimed the land under the deed. In addition to this, the evidence shows very satisfactorily that the land was commonly reputed in the neighborhood to be that of plaintiff; that Rickabaugh knew this; that he knew that the taxes were regularly paid by plaintiff; and, on one occasion, procured his attorney to apply to plaintiff by letter to purchase the land, prior to his purchase from Hamilton.

Taking all these facts into consideration we unite in holding that the defendant had, at least, sufficient notice to put him upon inquiry in respect to plaintiff's title, and that he cannot be considered a *bona fide* purchaser without notice. Under these cir-

cumstances the defendant was bound to inquire into the source of plaintiff's title, especially as his grantor, Hamilton, could show neither patent nor certificate of entry to any of the land he purported to convey.

The certificates were delivered to the plaintiff at the time of the conveyance to him by Thomas, and, upon the surrender of the certificates by plaintiff, the patents were *delivered* to and have ever since been held by him, and we are of opinion that the issuance of the patents by mistake or accident, in the name of Hamilton, did not, and will not, in equity, change the rights of the parties. Upon a proper application and showing of the facts, the Commissioner of the General Land Office would, as he possesses the authority, have canceled the patents and issued others in the name of Thomas, the assignee of the certificates.

This has been done in like cases, and has received the sanction of the Supreme Court of the United States, in *Bell* v. *Hearne et al.*, *supra*, which was a case where a patent had been issued by mistake, and the land was claimed by a purchaser at sheriff's sale on a judgment against the person in whose name the patent issued. Upon application to the commissioner the patent was canceled and another issued in the name of the person properly entitled thereto.

Campbell, J., in delivering the opinion of the court, says:

"The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that office for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly in the record, and is a necessarry power in the administration of every department;" and it was accordingly held that the Supreme Court of Louisiana erred in conceding *any effect or operation* to the patent thus issued by mistake in the name of James Bell, as vesting a title in a person of that name.

A court of equity, when all the parties are before it, will do in substance, though not in form, the same that the commissioner would have done. Instead of giving effect to, it will grant relief against mistakes. *Reversed.*

NOTE.—An assignee of a certificate of entry need not examine the

county records, to learn if his assignor had previously sold the land by deed. *Moore* v. *Hunter*, 1 Gil. (Ill.), 317. Neither need he record the assignment of the certificate of entry. *Martin* v. *Nash*, 31 Miss., 324.

The registration laws of the State do not embrace certificates of entry or patents, and the doctrine of notice does not apply to them. *Huntington* v. *Allen*, 44 Miss., 654.

Patents do not come within the provisions of the recording laws of the State, where the terms of the statute do not specifically include them. *Moran* v. *Palmer*, 13 Mich., 367; *Curtis* v. *Hunting*, 6 Iowa, 536.

A certified copy of the record of a patent from the county recorder, is not evidence, as the State law does not require the patent to be recorded. *Lyelt* v. *Maynard*, 6 McLean, 15.

SAMUEL BOYCE *v.* WILLIAM DANZ.

Supreme Court of Michigan.—April Term, 1874.—29 Michigan, 146.

Names; identity.—The use of different names by a party is immaterial where the question is one of identity merely, and the identity is clearly established.

Names; idem sonans.—Whether or not the names "Boyce" and "Bice" are sufficiently identical in sound to make the rule of *idem sonans* applicable:—*quære?*

Pre-emption laws; aliens; declaration of intention.—One of foreign birth who is otherwise duly qualified, is entitled under the pre-emption laws, after having in due from declared his intention of becoming a citizen, and before becoming fully naturalized, to file and maintain a pre-emption claim.

Settlement; possession.—The settlement upon the land required by the pre-emption laws is that of a qualified person; and the fact that one of foreign birth had been in possession prior to the date of declaring his intention to become a citizen, would not preclude him from pre-empting the land of which he continued in possession; and his settlement would be considered as commencing with the date of such declaration of intention.

The fact that one who had thus been in possession stated in his claim that he settled and improved the land at the date of his first taking possession, where he has otherwise complied with the law, as in case of a settlement made at the date of his becoming qualified by declaring his intention of becoming a citizen, will not invalidate his pre-emption.

Res adjuticatæ; land office; register and receiver.—The action of the register and receiver of the United States land office in accepting the proofs furnished by a pre-emptor as satisfactory, and receiving his money and issuing to him the usual duplicate, is a judicial deter-

mination of his rights, which is conclusive in all collateral proceedings.

Review ; commissioner of land office ; ex parte proceedings.—Whether or not the commissioner of the land office has any authority under the statute to review and reverse the action of the register and receiver, where there is no adverse claim under the pre-emption laws, his action, relied upon in this case, in exercising such right without notice to the party concerned, and thus overturning a formal adjudication without the privilege of a hearing, was contrary to the first principles of right ; and, moreover, it was founded on a mistake of the facts.

Equity jurisprudence ; Patentee ; trusts.—A court of equity may in a proper case adjudge the patentee of lands to hold as trustee for one having greater equities.

Laches ; possession.—A delay of five years by a party in possession in filing a bill to obtain the legal title, will not bar his equity where nothing has been lost by the other party in consequence.

This case and *Campau* v. *Van Dyke*, 15 Mich., 371 distinguished.

Heard January 8. Decided April 8.

APPEAL in Chancery from Wayne Circuit.

Divine & Wixson and *C. I. Walker* for complainant.

Moore & Griffin and *Theodore Romeyn* for defendant.

COOLEY, J. :

The bill in this case is filed to have a certain parcel of land which has been patented by the United States to the defendant, decreed to be equitably the property of the complainant, and to be held by the defendant in trust for him. The complainant's rights are rested upon the pre-emption laws of the United States, while the defendant relies upon his patent, and upon certain defects in complainanst's claim which are supposed to defeat it.

The facts in the case, as we find them established by the evidence, are as follows :

Complainant went upon the premises, which he found unoccupied, some time in February, 1857. The land then belonged to the United States, and was subject to pre-emption settlement, and complainant was in all respects qualified to make such a settlement, except that, being of foreign birth, he had not become naturalized or declared his intention so to do. On the 5th of March, 1857, however, he declared his intention in due form, but in the name of Samuel Bice, which he seems sometimes to have gone by.

On the same day he filed his pre-emption claim to this land.

Within the same month he completed a log-house on the land, and took his father and mother to live with him in it. On the 31st of March, 1857, defendant entered the same land at the land office, having at the time notice of complainant's occupation and claim. On March 1, 1858, complainant paid for his land, having previously furnished to the register and receiver of the land office at Detroit the proofs to their satisfaction of his right as a pre-emptioner. A duplicate in evidence of his right to a patent was then issued to him. On October 18, 1858, the Commissioner of the General Land Office wrote to the register and receiver at Detroit, that complainant's proofs were defective on certain points specified, and that additional evidence must be produced. It was not shown that this letter was ever brought to the notice of complainant, and he testified that it never was. Three years later the entry of the defendant was canceled by the commissioner, but on May 5th, 1862, the commissioner wrote to the register and receiver that "it appears that when Mr. Boyce made his entry, March 1, 1858, Mr. William Danz was residing on this land, and that he, in fact, was the first settler," and adding that Danz's entry was unadvisedly canceled; that his proofs and showing at the office justified his reinstatement, and that Mr. Boyce's entry was accordingly canceled. There was no showing and no claim in this suit that the statement in the commissioner's letter regarding the residence of Danz on the land when complainant made his entry, had any foundation in fact, and it was a mistake beyond question.

Defendant however, was now recognized at the General Land Office as the lawful claimant to the land, and on July 10, 1862, a patent was issued to him. Complainant in the meantime had continued in possession of the land, and had made valuable improvements upon it. These facts would appear to show an equitable right in complainant superior to that of the defendant, and to entitle him to the relief he seeks, unless his failure to comply with some requirements of the pre-emption laws precluded him from their benefits; and it now becomes necessary to determine whether such a failure had occurred. As it may fairly be assumed that the counsel for defendant have in their argument suggested all the defects that are supposed to exist, we may confine our attention to the propositions relied upon by them, taking it for granted that they direct us to all the weak points in complainant's case.

The first objection relied upon is the discrepancy between the name made use of by the complainant in declaring his intention

to become a citizen, and that in which he made his entry and brings this suit. The names "Boyce," and "Bice" it is said, are not *idem sonans*, and presumptively belong to different persons. We have already said that the evidence shows them to have been both used by complainant, and as this is a question of identity, and the identity is established to the satisfaction of the court, this objection would seem to be removed. If the evidence had left the identity in doubt, it might be worthy of consideration whether the two words as commonly pronounced, especially by foreigners, are not sufficiently identical in sound to make the rule of *idem sonans* applicable; but we need not discuss the point on this record.

A further objection is that complainant never became a citizen: and his failure to take all the steps necessary to that end, it is said, is in contravention of the policy of the pre-emption laws, and deprives him of all claim upon the equitable consideration of the court. The policy of the pre-emption laws is to be learned from the laws themselves, and in terms they confer rights upon those who are citizens or declare their intention to become such, who occupy the land and make the necessary proofs and payment. No officer and no court has any authority to add further conditions; but it is a circumstance worthy of remark that by force of our constitution and laws the complainant, by his declaration of intention and subsequent residence in the State, became entitled to exercise the elective franchise and to hold office, and was vested with nearly all the rights and privileges of a naturalized citizen: and he might well suppose, as most persons would be likely to under such circumstances, that anything further was not called for.

It may not be an unreasonable inference that the pre-emption laws have had the State laws of this and other States in view, and that it was not thought important or politic to require more from pre-emptioners than was required to make them citizens of some of the States and participants in congressional and other elections.

It is objected further that complainant did not perfect his right by payment within twelve months after his settlement, as was required by the pre-emption laws. The particular law referred to is the act of September 4, 1841, § 15, of which (Bright Dig., 574, § 88), provides that whenever any person shall settle and improve a tract of land subject at the time of settlement to private entry, and shall intend to purchase the same under the pro-

visions of the act, he shall, within thirty days after the date of settlement, file with the register of the district a written statement describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of said act; and that within twelve months after settlement he shall make proofs, as by the act required, and also pay for the land; and in case of any failure the land shall be subject to entry by any other person.

As already stated, complainant went upon the land in February, 1857, but he had not then declared his intention to become a citizen, nor did he make that declaration until the fifth day of the next month. Before that day it was not competent for him to file a pre-emption claim, or to claim any benefit under the act. His claim was in fact filed on the fifth day of March, the same day he declared his intention to become a citizen, and the proofs are clear that within twelve months from that time he made his proofs and paid for the land.

The defect in his right then, if any, must be either, *first*, that he was in possession of the land before he was competent to make a pre-emption claim; or, *second*, that in his claim he stated that "on the 20th day of February, 1857, he settled and improved" the land now in dispute, and is consequently estopped from dating the commencement of his settlement under the act at any later day. On the first ground he certainly could not be precluded. It would be an extraordinary construction to put upon the pre-emption laws that one should be wholly excluded from their benefits because he has had already been for a year in possession of the land, but not during that time qualified to take the benefit of their provisions.

The settlement contemplated, as it seems to us, must be the settlement of a qualified person; and that of the complainant must consequently be deemed to have begun on the 5th of March, 1857. And we may reasonably suppose this to have been the understanding of the complainant, who appears to have acted in strict accordance with that view, though in filing his claim he may have thought it necessary to state with accuracy the time when he took possession and began improvements.

If we are correct in this, the case of complainant would appear to be made out: but if we err in our conclusion, the fact still remains that the register and receiver of the land office have accepted the proofs furnished by complainant as satisfactory, and

have taken his money and issued the usual duplicate. And the question would then be presented whether their conclusion is not binding upon us, even though we might regard it as erroneous.

Under the statute the proofs are to be made to the satisfaction of these two officers. (Stat., 4 Sept., 1841, § 12; Bright Dig., 473; § 85.) These officers act judicially in passing upon the proofs. (*Wilcox* v. *Jackson*, 13 Pet., 498; *Lytle* v. *State*, 9 How., 333.) and we have not been referred to any statute which authorizes the Commissioner of the General Land Office to review and reverse their action, in cases like this, where there was no adverse claim under the pre-emption laws. And if he had the power it would be contrary to the first principles of right that he should exercise it without giving notice to the party concerned, and thus vacate a formal adjudication without the privilege of a hearing. And the action of the commissioner in this case appears to have been not only entirely *ex parte*, but also to have been founded upon a mistake as to the facts.

It is not disputed by defendant that a court of equity may, in a proper case, adjudge the patentee to hold as trustee for one having greater equities, when a proper case is made out. The authority has often been asserted by the Supreme Court of the United States, and the principles on which it is to be exercised are well understood. It will be sufficient in this case to refer to a few of the cases. (*Bagnell* v. *Broderick*, 13 Pet., 436; *Garland* v. *Wynn*, 20 How., 8; *Lytle* v. *Arkansas*, 22 How., 193; *Clements* v. *Warner*, 24 How., 394; *Lindsey* v. *Hawes*, 2 Black, 559; *Stark* v. *Starrs*, 6 Wall., 402; *Johnson* v. *Towsley*, 13 Wall., 72; *Frisbie* v. *Whitney*, 9 Wall., 196.)

The defendant, however, insists that complainant has been guilty of *laches* and has lost his rights thereby, and he refers to *Campau* v. *Van Dyke*, 15 Mich., 371, as furnishing support to this position. The two cases have no analogy. There a party out of possession attacked a decree in chancery for fraud, after a delay of more than six years, which had been prolonged until the principal actors in the suit in which the decree had been rendered had been taken away by death, and until in consequence explanations had become impossible. The court, it is believed justly, required satisfactory excuse for the delay, and none was given. In this case the complainant has all the time been in the enjoyment of his property, and was therefore not called upon to exercise the same diligence which might have been required of one

who was kept out of the rights he claimed; and we find nothing in the case to satisfy us that defendant has been injured by the delay.

When complainant's right was assailed he defended it, and when the legal defence was found insufficient, he resorted to a court of equity. He has not been as diligent as he might have been, but a delay of five years by a party in possession in filing a bill to obtain the legal title cannot be regarded as sufficient to bar his equity, where nothing has been lost by the other party in consequence.

The decree of the court below appears to be correct, and it must be affirmed, with costs.

GRAVES, CH. J., and CAMPBELL, J., concurred.
CHRISTIANCY, J., did not sit in this case.

If a person assume a name not his own, and enter land in such name, the patent issued to him under such assumed name, is valid. *Thomas* v. *Wyatt*, 31 Mo., 188.

EDWIN C. LITCHFIELD *v.* OLAF JOHNSON AND LEWIS JOHNSON.

U. S. Circuit Court, District of Iowa, 1877.—4 Dillon, 551.

1. Settlers on what are known as the Des Moines river lands, in Iowa, may be entitled to the benefits given by the statute to occupying claimants when they have made valuable improvements on lands of which they are afterwards adjudged not to be the rightful owners.
2. The "occupying claimants," statute of Iowa, as to "color of title" and "good faith," construed.[1]

Before DILLON and LOVE, JJ.:

Occupying Claimant—Compensation for Improvements—"Color of Title"—Good Faith.

On April 24th, 1874, Litchfield commenced an action of ejectment against the defendants for the south half of the southeast quarter of section 9, township 86, range 26, and at the May term, 1874, recovered judgment. Thereupon the defendants, under the statutes of Iowa, filed their petition as occupying claimants (Revision, sec. 2,264, Code, sec. 1,976), claiming to be allowed for improvements made by them on the land under color of title and

in good faith. Issue was taken on this petition, and the case thus made was referred by consent to John N. Rogers, Esq., as referee, who, after hearing the evidence, found the following conclusions of fact and of law:

Conclusions of Fact.—The defendants entered upon and took possession of the land in question in the fall of the year 1866, having no claim or color of title thereto, but under the belief that said land was the property of the United States, and open to pre-emption, and with the intent to pre-empt the same, or to enter it under the homestead act, and they have ever since continued in such possession, holding adversely to all parties except the United States.

Under the belief aforesaid they made improvements on said land, of which the present value is three hundred and seventy-five dollars ($375.) All of said improvements, excepting fifty dollars in value thereof, were made before the expiration of five years from the time when said defendants took possession of said land, and before they had acquired color of title thereto. Defendants have never acquired any color of title to said land otherwise than by virtue of their occupancy thereof for five years. The value of said land, aside from said improvements, is six hundred and eighty dollars ($680.) The value of the rents and profits of said land, aside from the improvements during the time of defendants' occupancy thereof, is the sum of twenty-five dollars ($25.)

Conclusions of Law.—1. Defendants had color of title to said land from the expiration of five years from the time when they entered on the same, and up to the beginning of this action, by virtue of their five years' occupancy thereof.

2. The improvements were made by them in good faith.

3. The defendants are entitled to be allowed the value of their improvements as provided by the statute, including those made before they acquired color of title.

This appears to me to be a very doubtful point or principle, and I am induced to hold thereon as above cited, chiefly because it it stated by counsel for defendants to have been so held by his honor the circuit judge in the case of *Lancaster* v. *Crouse*, in this court, and because, on examination of the papers in that case, including the instructions to the jury given and refused, it appears *probable* that such a view was then taken by the court, although it does not appear with entire clearness.

4. If the court should agree with me in the point last men-

tioned, then defendants are entitled to a judgment, ascertaining the rights of the parties, in conformity to the provisions of sections 1,979–1,981, of the Code of Iowa, on the basis of the findings hereinbefore contained, as to the value of the land, of the improvements, and of the rents and profits; that is, the amount to be paid defendants for their improvements should be fixed at three hundred and fifty dollars, being the present value of the improvements, less the value of the rents and profits of the land, as improved during its occupancy by defendants.

But, if the court should be of opinion that defendants are not entitled to be allowed for improvements made before they acquired color of title, then the judgment should provide for payment to defendants of only twenty-five dollars on account of their improvements.

5. As nothing is provided by the statute in respect to a judgment for costs in favor of either party, on such proceedings, I am of the opinion that each party must pay his own costs.

The plaintiff in the main action (Litchfield) excepted to this report on the ground, first, that the evidence did not establish that the improvements were made in good faith; and for the reason, second, that the claimants cannot be allowed for improvements made during the first five years of their occupancy, but only for those made after the expiration of five years from the time they entered on the premises, and prior to the commencement of this action. On these exceptions the case is now before the court.

Wright, Gatch & Wright for the plaintiff.

Duncombe, O'Connell & Springer for the occupying claimants.

DILLON, Circuit Judge:

The amount involved in this particular case is small, but the case itself is important, as the principles of law which apply to it are decisive of a large number of like causes pending in the court.

1. The referee has found, as a fact, that the defendants, in the fall of 1866, entered on the land, the same being then vacant, under the belief that it was the property of the United States, open to pre-emption, with the intent to pre-empt it or enter it under the homestead act, and have ever since continued in possession, holding adversely to all parties except the United States. This finding of fact is sustained by the proofs, and supports the legal conclusion that the improvements were made "in good faith,"

within the meaning of the *occupying claimant statute* of this State.

The extent of the Des Moines river grant had, it is well known, been the subject of conflicting decisions on the part of the executive branch of the government, previous to the December term, 1866, of the Supreme Court, when the case of *Walcott* v. *The Des Moines River Company* (5 Wall., 681), was decided, which was after the defendant took possession of the land, and in respect of which the defendant, a foreigner, almost unacquainted with our language, testifies he knew nothing, and it was not until the December Term, 1869, that the case of *Wells* v. *Riley* was determined, in which it was first held that the permission of the local land officers to occupants to prove possession and improvements, and to make entry of these Des Moines river lands, under the pre-emption laws, was unauthorized and void. There is nothing in the history of this grant, whether legislative, executive, or judicial which makes it impossible, or even improbable, that settlers upon these lands prior at least, to the final decision of *Wells* v. *Riley*, might not be such, in good faith, as respects the title held by the plaintiff. (*Wells* v. *Riley*, 2 Dillon, 566.)

2. But the principal question in the case is, whether, conceding the "good faith" of the claimants, they are entitled to be allowed for all valuable improvements made prior to the beginning of the ejectment suit, or only those made prior to that time, and after the expiration of five years from the time of entering on the land.

The language of the statute giving the right of compensation to the claimant in this form, is, "where an occupant of land has color of title thereto, and, in good faith, has made any valuable improvements thereon, and is afterwards found not to be the rightful owner," he shall be entitled to pay, in the manner provided, for such improvements. It is insisted by the plaintiff that, to entitle the occupant to compensation for his improvements, "it must appear that they were made in good faith, *and* under color of title; in other words, color of title must concur, co-exist, with good faith, at the *time* of making the improvements." Hence, as in this case, color of title depends upon five years' possession (Revision of 1860, sec. 2,269), no improvements made during the five years, though made in good faith, can be considered, while for all that were made after the lapse of the five years, compensation may be allowed. The language of the statute above quoted is not free from ambignity. The words used

might be made to bear the construction contended for by the plaintiff.

I have carefully considered the reasons for that construction, which were so ably urged by the plaintiff's counsel at the bar, and enforced with additional illustrations and learning in his printed argument, without being convinced that it is the necessary or true meaning of the statute. An equally natural meaning of the words used, is, that the "color of title" must exist before and at the time when the suit of the rightful owner is brought against the occupant, in which case the occupant may be compensated for any valuable improvements made thereon in good faith, the statute prescribing no limitation as to the time when they were made. These remedial statutes are entitled to a fair and even liberal construction (*Longworth* v. *Worthington*, 6 Ohio, 10); and the view we adopt harmonizes with the evident policy of the legislature, as shown by the expressed provisions made by the legislature of Iowa, to extend to the settlers "on any of the lands known as the Des Moines river lands," the rights given by the occupying claimant statute (Revision of 1873, secs. 1,984, 1,987.)

We do not place our judgment upon the legislation last mentioned, since the improvements in this case were largely made before that time, although this legislation preceded, by several years, the suit brought to recover possession.

It is by no means clear that the equities of an occupant, who, in good faith, has made improvements during a period when the real owner was negligent in asserting his rights, may not be provided for by retrospective legislation; but it is not necessary to enter upon the consideration of that question, as, in my judgment, the claimant's case is embraced in the provisions of the general statute. (Revision, sec. 2,264; Code, sec. 1,976; *Society, etc.*, v. *Pawlet*, 4 Pet., 480; *Albee* v. *May*, 2 Paine, 74; *Green* v. *Biddle*, 5 Pet., 381.)

The exceptions to the report of the referee are disallowed, and judgment will be entered in conformity therewith.

Judgment accordingly.

LOVE, J., concurs.

(MR. JUSTICE MILLER, to whom the record and arguments in this cause were submitted, expressed his concurrence in the foregoing opinion.—REP.)

NOTE.—The holder under a void patent is entitled to relief under the occupying claimant law. *Chinn* v. *Darnett*, 4 McLean, 410. If one purchase from an Indian reservee while a sale by him is prohibited and go into possession under the purchase, and make improvements on the land, and the land is afterward legally sold to another by the Indian, the first purchaser is entitled to pay for his improvement under the occupying claimant law of the State. *Kraus* v. *Means*, 12 Kansas, 335. See *Iowa R. R. and L. Co.* v. *Adkins*, 38 Iowa, 351. Also see the case of *Maynes* v. *Veale*, 20 Kansas, 374, where the doctrine is held not to apply.

The act of the State legislature of March 30, 1868, which provided that improvement placed on public lands of the United States, may be removed after the land shall have been sold, is void, so far as it authorizes the removal of improvements which constitute part of the realty. *Collins* v. *Bartlett*, 44 Cal., 371, and *Pennybecker* v. *McDougal*, 48 Cal., 160.

HOGAN *v.* PAGE.

December Term, 1864.—2 Wallace, 605.

1. A patent certificate, or patent issued, or a confirmation made to an original grantee or his "*legal representatives*" embraces representatives of such grantee by contract, as well as operation of law; leaving the question open in a court of justice as to the party to whom the certificate, patent, or confirmation should enure.
2. The fact that A, many years ago, did present to a board of commissioners appointed by law to pass upon imperfect titles to land, a "claim" to certain land, describing it as "formerly" of B, an admitted owner; the fact that the board entered on its minutes that A, "assignee" of B, presented a claim, and that the board granted the land to "representatives" of B, and the fact that A, with his family was in possession of the land many years ago, and cultivating it, are facts which tend to prove an assignment; and as such, in an ejectment where the facts of an assignment is in issue, should be submitted as evidence to the jury.

ERROR to the Supreme Court of Missouri; the case being thus:

After the cession in 1803, by France, of Louisiana, to the United States, Congress passed an act (Act of 3d March, 1807, 2 Stat. at Large, 440), establishing a board of commissioners at St. Louis, for the purpose of settling imperfect French and Spanish claims. The act provided that any person who had, for ten consecutive years prior to the 20th December, 1803, been in possession of a tract of land not owned by any other person, &c., "should be confirmed in their titles."

In 1808, one Louis Lamonde presented a claim for a tract of one by forty arpens, "formerly the property of Auguste Conde." The minutes of the board of November 13th, 1811, disclosed the following proceedings:

"Louis Lamonde, assignee of Auguste Conde, claiming one by forty arpens, situate in the Big Prairie district of St. Louis, produces a concession from St. Ange and Labuxiere, lieutenant governor, dated 10th January, 1770. (This concession, about which there was no dispute, was to Conde.) The board granted to the *representatives* of Auguste Conde forty arpens, under the provisions of the act of Congress, &c., and ordered that the same be surveyed, conformably to possession," &c.

The minutes did not record the fact that any *assignment* of this land from Conde to Lamonde had been presented to the board, or that other proof was made of such conveyance.

This decision of the board, among many others, was reported to Congress, and the title made absolute by an act of 12th April, 1814. In 1825, Lamonde obtained from the recorder of land titles a certificate of the confirmation.

Hogan claiming through Lamonde, now, A. D. 1850, brought ejectment at St. Louis, against Page, for a part of this land. Lamonde was an old inhabitant of St. Louis, who had died some ten years before the trial at a very advanced age; and there was some evidence on the trial that he and his family cultivated this lot in the Grand Prairie at a very early day, before the change of government under the treaty of 1803: and evidence that by the early laws of the region these interests passed by parol.

The court below decided that the plaintiff was not entitled to recover upon the evidence in the case.

Mr. Gantt for the defendant here and below, in support of this ruling insisted here that, as no assignment or transfer of Conde's interest in the concession was proved before the land board or at the trial, the confirmation could not enure to the benefit of Lamonde, so as to invest him with the title; and that, in the absence of the assignment, the confirmation "to the representatives of Auguste Conde" enured to the benefit of his heirs.

Messrs. Browning, Hill, and *Ewing* argued *contra* for the plaintiff, that, as Lamonde presented his claim to the board, as assignee of Conde, and as such set up a title in his notice of the application, the act of the board should be regarded as a confirmation of his right or claim to the land; and the cases of *Strother* v. *Lucas* (12 Peters, 453), *Bissell* v. *Penrose* (8 Howard, 338), and

Landes v. *Brant* (10 Howard, 370), in this court, were referred to as supporting this view of the confirmation.

MR. JUSTICE NELSON delivered the opinion of the court.

On looking into the cases cited on the part of the plaintiff, it will be seen that the confirmations which there appeared were either to the assignee claimant by name, or in general terms, that is, to the original grantee and "his legal representatives;" and when in the latter form, it was the assignee claimant who had presented the claim before the board, and had furnished evidence before it of its derivative title, and which had not been the subject of dispute. The present case, therefore, is different from either of the cases referred to.

A difficulty had occurred at the land office, at an early day, in respect to the form of patent certificates and of patents, arising out of applications to have them issued in the name of the assignee, or present claimant, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. This difficulty, also, existed in respect to the boards of commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the Attorney General, that the commissioner of the land office recommended a formula that has since been very generally observed, namely, the issuing of the patent certificate, and even the patent, to the original grantee, or *his legal representatives*, and the same has been adopted by the several boards of commissioners. This formula "or his legal representative" embrace representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent, or confirmation, should enure.

Now, upon this view of the case, we think the court below erred in ruling, as matter of law, that the plaintiff was not entitled to recover. The question in the case is, whether or not the evidence produced by the plaintiff on the trial before the jury tended to prove that there had been an assignment by the one of forty arpens from Conde to Lamonde, prior to his notice of the claim before the board of commissioners in 1808? If it did, then it should have been submitted to the jury as a question of fact, and not of law. The transaction was ancient, and of course it could

not be expected that the evidence would be as full and specific as if it had occurred at a more recent period.

The piece of land is but a moiety of the original concession to Conde; and it appears that previous to the change of government, and while Conde was living, Lamonde and his family were in possession cultivating the strip, in the usual way in which these common field lots were occupied and improved. And very soon after the establishment of a board at the town of St. Louis, for the purpose of hearing and settling these French and Spanish imperfect grants, we find him presenting this claim before the board, setting up a right to it as his own, and asking for a confirmation; and in the proceedings of confirmation, the board speak of it as a claim by Lamonde, assignee of Conde.

The title did not become absolute in the *confirmé*, whoever that person might be, till the passage of the act of 1814: and in 1825, Lamonde, for he appears to have been then alive, procured from the recorder of land titles the certificate of confirmation.

We are of opinion that these facts should have been submitted to the jury, for them to find whether or not there had been an assignment or transfer of interest in this strip of one by forty arpens from Conde to Lamonde. Especially do we think that the question should thus have been submitted, as it appears that at this early day and among these simple people, a parol transfer of this interest was as effectual as if it had been in writing.

Judgment reversed with costs, and cause remanded with directions to issue new venire.

GIBSON *v.* CHOUTEAU.

December Term, 1871.—13 Wallace, 92.

1. Statutes of limitation of a State do not apply to the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included; and they do not apply to the United States.
2. The power of Congress in the disposal of the public domain cannot be interfered with, or its exercise embarrassed by any State legislation; nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.

3. The patent is the instrument which, under the laws of Congress, passes the title of the United States, and in the action of ejectment in the Federal courts for lands derived from the United States the patent, when regular on its face, is conclusive evidence of title in the patentee. And in the action of ejectment in the State courts when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent is also conclusive.
4. The occupation of lands derived from the United States, before the issue of their patent, for the period prescribed by the statutes of limitation of a State for the commencement of actions for the recovery of real property, is not a bar to an action of ejectment for the possession of such lands founded upon the legal title subsequently conveyed by the patent. Nor does such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed, whether asserted in a separate suit in a federal court, or set up as an equitable defence to an action of ejectment in a State court.
5. The doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and, where several proceedings are required to perfect a conveyance of land, it is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.

ERROR to the Supreme Court of the State of Missouri.

Gibson brought ejectment in the St. Louis Land Court against Chouteau, to recover sixty-four acres of land in the county of St. Louis, Missouri. By consent of parties the case was tried by the court without a jury. On the trial the plaintiff claimed title to the demanded premises under a patent of the United States issued to his immediate grantor, which he produced. The facts which led to the issue of the patent were these:

As early as September, 1803, as appeared from the record, one James Y. O'Carroll obtained permission from the Spanish authorities to settle on vacant lands in the District of New Madrid, in the Territory of Louisiana. In pursuance of this permission he occupied and cultivated, previously to December 20th, of that year, portions of a tract embracing one thousand arpens of land, in that part of the country which afterwards constituted the county of New Madrid in the Territory of Missouri. After the cession of Louisiana to the United States, he claimed the land by virtue of his settlement: and this claim was subsequently confirmed to

him and his legal representatives, under different acts of Congress, to the extent of six hundred and forty acres.

In 1812 a large part of the land in the county of New Madrid was injured by earthquakes, and in 1815 Congress passed an act for the relief of parties who had thus suffered. (3 Stat. at Large, 211.) By this act, persons whose lands had been materially injured were authorized to locate a like quantity of land on any of the public lands in the Territory of Missouri, the sale of which was authorized by law: and it was made the duty of the recorder of land titles in the territory, when it appeared to him from the oath or affirmation of a competent witness or witnesses, that any person was entitled to a tract of land under the provisions of the act, to issue to him a certificate to that effect. On this certificate, upon the application of the claimant, a location was to be made by the principal deputy surveyor of the territory, who was required to cause the location to be surveyed, and a plat of the same to be returned to the recorder with a notice designating the tract located, and the name of the claimant.

The act further provided for a report to be forwarded by the recorder to the Commissioner of the General Land Office of the claims allowed and locations made; and for the delivery to each claimant of a certificate of his claim and location, which should entitle him, on its being transmitted to the commissioner, "to a patent to be issued in like manner as is provided by law for other public lands of the United States." The act also declared that in all cases where the location was made under its provisions, the title of the claimant to the injured land should revert to and vest in the United States.

The land claimed by O'Carroll, in New Madrid county, afterwards confirmed to him, as already stated, to the extent of six hundred and forty acres, was injured by earthquakes, and in November, 1815, the recorder of land titles in St. Louis, upon proper proof of the fact, gave a certificate to that effect, and stating that under the act of Congress O'Carroll, or his legal representatives, were entitled to locate a like quantity on any of the public lands of the Territory of Missouri, the sale of which was authorized by law.

In June, 1818, a location of the land was made on behalf of one Christian Wilt, who had become by mesne conveyances the owner of the interest of O'Carroll. The land thus located had been previously surveyed by the deputy surveyor of the territory.

but from some unexplained cause the survey and plat thereof were not returned to the recorder until August, 1841. The recorder then issued a patent certificate to "James Y. O'Carroll or his legal representatives." A report of the location was also made by him, as required by the act of Congress, to the Commissioner of the General Land Office, but it appeared that the survey of the location did not meet the approval of that officer, as it did not show its interferences with conflicting claims. Accordingly, in a communication dated in March, 1847, the commissioner required the surveyor general of Missouri to examine into the interferences, and ascertain the residue of the O'Carroll claim, and stated that on the return to the land office "of a proper plat and patent certificate for said residue, a patent" would issue. Under these instructions a new survey and plat were made, showing the interferences of the survey with other claims, and on the 26th of March, 1862, were filed with the recorder, and a new patent certificate was issued. Upon the corrected survey and plat and new certificate, the patent of the United States was, in June, 1862, issued to Mary McRee, who had acquired by various mesne conveyances the interest of Wilt in the land. In August following she conveyed to the plaintiff.

On the trial, the defendants endeavored to show that they had become, through certain legal proceedings, the owners of the interest originally possessed by Wilt, and consequently had acquired the equitable title to the land upon which they could defend against the patent, under the practice which prevails in Missouri. But in this endeavor they failed, the Supreme Court of the State holding that the conveyances under which they claimed were inoperative and void.

The defendants also relied upon a deed of Samuel McRee and wife, (the Mary McRee already named), executed in 1838, contending that by operation of the deed under the statutes of Missouri, the equitable title which these grantors had subsequently acquired to the land and also the legal title conveyed by the patent to Mrs. McRee, enured to the benefit of the defendants; but the supreme court held that the deed only had the effect of a quit-claim of an existing interest, and did not affect any subsequently acquired title.

The rulings of the State court upon these grounds were not open to review in this court, as they involved no questions of federal jurisdiction. But it also appeared in evidence that the

defendants, previous to the issue of the patent, had been in the possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri, within which actions for the recovery of real property must be brought. By the statutes of the State the action of ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location against any person not having a better title. (General Statutes of Missouri of 1825, chap. 151, sections 1 and 11.) The defendants, therefore, contended that the statute of limitation, which had run against the equitable title, created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title, acquired by the patent of the United States.

The land court held that the effect of the patent issued by the United States to Mrs. McRee was to invest her with the legal title to the land in dispute: and that the title vested in the plaintiff through the deed to him from Mrs. McRee was superior to any title shown by the defendants to the land in question under the New Madrid certificate of location, and that the said patent having issued to Mrs. McRee within ten years next before the commencement of this suit, the possession of the defendants was not a bar to the plaintiff's recovery, and gave verdict and judgment accordingly for the plaintiff. From the judgment the case was taken to the Supreme Court of the State, and was twice heard there. Upon the first hearing the court affirmed the decision of the inferior court, holding that "until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent."

On the second hearing, the court adhered to all its previous rulings, except that which related to the effect of the statute of limitations, and upon that it changed its previous ruling and held that the statute barred the right of action upon the patent. In its opinion given on the second decision, after referring to its previous conclusion, cited above, it says:

"This conclusion proceeded upon the ground that, although the action given by the statute upon the equitable right only, which had passed out of the United States, might be barred, it did not follow that an action based upon the right of entry by virtue of the absolute legal title by patent, would also be barred. The idea that the fiction of relation could be applied not only to carry the legal title to the owner of the inceptive right through the intermediate conveyances, but also for the purpose of bringing it

within the operation of the statute of limitations from the date of the inceptive equity, had not been suggested, and had not occurred to us."

Again, the court, after recognizing the fact that the legal title remained in the United States till the patent issued, and that the location only gave an equitable right, upon which an action was sustainable in the State courts, by virtue of the State statute, said:

"The two rights of entry, therefore, are distinct in themselves, and the causes of action have a different foundation. The possession of the land is claimed in both, but by different rights, and if there were nothing more, the one cause of action might be barred, and not the other. But there is another principle upon which we think the statute may be made to operate here as a bar to the plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act or inception of the conveyance, to vest the title in the owner of the equity as of that date, and make it pass from him to the patentee named, through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus merged in one, and the statute may be held to have operated on both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the statute on its way and cut off with which existed before."

The Supreme Court accordingly reversed the decision of the land court, and the case was brought here on writ of error, under the 25th section of the Judiciary Act, and is reported in *Gibson* v. *Chouteau* (8th Wallace, 314.) When presented, the record disclosed questions respecting the validity of Mrs. McRee's title, the transfer of her title to the plaintiff, and the trust asserted by which it was contended that the plaintiff's title enured to the benefit of the defendants, as well as the statute of limitations. This court, therefore, as the report already mentioned shows, dismissed the writ of error, because the record did not show that the decision of the State court turned on the question of the statute of limitations, or that the determination of this question against the plaintiff was essential to the second judgment rendered.

When the case went back to the Supreme Court of the State,

that court set aside its judgment, stating that it had been rendered on the question of the statute of limitations; but that, by a clerical error, such fact was not stated therein.

The case was then again submitted to that court, and the court then adjudged that the plaintiff was barred by the statute of limitations, all other questions being determined in his favor. It was this judgment which was now brought before this court on writ of error.

Messrs. Montgomery Blair and *F. A. Dick* for the plaintiff in error.

Messrs. Glover and Shepley contra.

MR. JUSTICE FIELD delivered the opinion of the court.

It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy: that, as he was occupied with the cares of government, he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. (*United States* v. *Hoar*, 2 Mason, 312; *People* v. *Gilbert*, 18 Johnson, 228.)

With respect to the public domain, the constitution vests in Congress the power of disposition, and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right, or embarrass its exercise: and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal

of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to posses and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Yet such forfeitnre is claimed by the defendants in this case, and is sanctioned by the decision of the Supreme Court of Missouri. That court does not, it is true, present its decision in this light, but, on the contrary, it attempts to reconcile its decision with positions substantially such as we have already stated, respecting the power of Congress over the public lands, and the inability of the State to interfere with the primary disposal of the soil of the United States. It declares it to be well settled, that statutes of limitation of a State cannot run against the United States, nor affect their grantees, until the title has passed from the proprietary sovereignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent is issued; and that the action upon the equitable title created by the location, is only given by a statute of the State; and as the two rights of entry have a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force, but for the operation of the fiction of relation. By a novel application of that doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

By the doctrine of relation is meant that principle by which an

act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. (*Lessieur* v. *Price*, 12 Howard, 74.)

The Supreme Court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before." (*Gibson* v. *Chouteau's Heirs*, 39 Missouri, 588.)

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. (*Lynch* v. *Bernal*, 9 Wallace, 315; *Jackson* v. *Bard*, 4 Johnson, 230; *Heath* v. *Ross*, 12 *Id.*, 140; *Littleton* v. *Cross*, 5 Barnewall and Cresswell, 325, 328.) The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the State. It left the right of entry

upon the legal title subsequently acquired by the patent wholly unaffected.

In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or cancelling the patent. (*Stephenson* v. *Smith*, 7 Missouri, 610; *Barry* v. *Gamble*, 8 *Id.*, 881; *Cunningham* v. *Ashley*, 14 Howard, 377; *Lindsey* v. *Hawes*, 2 Black, 554; *Stark* v. *Starrs*, 6 Wallace, 402; *Johnson* v. *Towsley*, *supra*.) But, in the action of ejectment in the federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.

So also in the action of ejectment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell* v. *Broderick*, 13 Peters, 450, "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In several of the States, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defence to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title. (*Estrada* v. *Murphy*, 19 California, 272; *Weber* v. *Marshall*, *Ib.*, 457; *Lestrade* v. *Barth*, *Ib.*, 671.)

In *Maguire* v. *Vice*, 20 Missouri, 431, where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defence, the Supreme Court of Missouri said: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party by his pleadings sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done, whether he is seeking relief as plaintiff or defendant."

But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted. (*Wilcox* v. *Jackson*, 13 Peters, 516, 517; *Irvine* v. *Marshall*, 20 Howard, 558; *Fenn* v. *Holme*, 21 *Id.*, 481; *Lindsey* v. *Miller*, 6 Peters, 672.)

Judgment reversed, and the cause remanded for further proceedings pursuant to this opinion.

JUSTICES DAVIS and STRONG dissented.

NOTE.—The statute of limitation of California does not begin to run against the owner of a confirmed Mexican grant, until the patent has been issued. *Le Roy* v. *Carroll*, 3 Sawyer, 66; *Gardiner* v. *Miller*, 47 Cal., 570; *Galindo* v. *Whitenmeyer*, 49 Cal., 12.

The time under the statute begins to run from the time the person has a title upon which he can maintain an action of ejectment. *Bryan* v. *Forsyth*, 19 How., 334; *Dillingham* v. *Brown*, 38 Ala., 311; also see, *Dredge* v. *Forsyth*, 2 Black, 563; and *Lindsey* v. *Miller*, 6 Pet., 666.

Holding possession under a tax deed, valid on its face, and the pay-

ment of taxes on the land, cannot help the statute, if the land had not been sold by the United States. *Thompson* v. *Prince*, 67 Ill., 281.

A prescriptive right of overflowing the public lands, or diverting the use of water, cannot be acquired so long as the title is in the United States. *Union M. and M. Co.* v. *Ferris*, 2 Sawyer, 176; *Wilkins* v. *McCue*, 46 Cal., 656; *Wilcoxon* v. *McGehee*, 12 Ill., 381.

MEADER ET AL. *v.* NORTON.

December Term, 1870.—11 Wallace, 442.

1. Nothing more is contemplated by proceedings under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, than the separation of lands owned by individuals, from the public domain. A decree confirming a claim to land rendered in such proceedings, even when followed by a patent of the United States, is not conclusive upon the equitable rights of third persons. They can assert such rights in a suit in equity against the patentee and parties claiming under him, with notice.
2. In a suit at law, a patent is conclusive evidence of title against the United States, and all others claiming under the United States, by a junior title. Until the patent issues, the fee is in the government; but, when it issues, the legal title passes to the patentee. Persons, therefore, claiming the land against the patent, cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power extends to cases where one man has procured the patent which belonged to another, at the time the patent was issued.
3. In 1839, three sisters obtained from the governor of the department of California, a grant of land, which was approved by the departmental assembly, and official delivery of possession was given to them. Some years afterwards, the husband of one of the sisters, named Bolcoff, suppressed or destroyed their grant, and fabricated a pretended grant to himself, of the land, and also certain other papers intended to prove the genuineness of such fabricated grant. Upon these papers, the sons of Bolcoff, he having died, obtained a confirmation of their claim, under said pretended grant, to the land, the land commissioners acting upon the supposition that the fabricated papers were genuine, no question as to their genuineness being raised before them; and upon such decree, a patent of the United States issued to the claimants. The fabricated character of these papers being discovered, the grantee of the rights of the three sisters brought a suit in equity to have the defendants holding under the patentees declared trustees of the legal title, and to compel a

transfer of that title to him. *Held*, that the suit would lie, and that upon proof of the fabricated character of the papers, the complainant was entitled to a decree against all the defendants who had purchased with notice of the claim of the sisters, and had not obtained conveyances or releases from them.

4. Laches and the statute of limitations cannot prevail as defences, where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.

APPEAL from the Circuit Court for the District of California.

This was a bill in equity, filed in the court below by C. E. Norton, to have the defendants, Meader and several others, declared trustees of certain real property situated in the State of California, and to obtain a decree that they convey to him the legal title held by them to the premises. The case, as presented by the record, was thus:

Three sisters, named respectively Maria Candida, Maria Jacinta, and Maria Los Angeles Castro, on the 13th of February, 1839, applied by petition to J. B. Alvarado, then Mexican governor of the department of California, for a grant of the land known as the Rancho El Refugio, situated in that part of California now known as the county of Santa Cruz.

This petition was immediately referred by the governor to the administrator of the adjoining mission, with directions to make a report upon the same. On the 10th of March following, that officer reported that the land solicited could be granted, and on the 16th of the same month, the governor made a provisional concession of it to the petitioners—a concession which was subject to further action in the premises. To guide him in such further action, the governor directed the prefect of the district to report to him upon the subject.

The prefect reported that a grant in fee of the land solicited could be made to the parties, as it was vacant, and not claimed by anyone. Accordingly, on the 8th of April following (1839), the governor made a formal cession of the land to the three sisters by name, referring to the previous proceedings, and declaring them owners in fee, and directing that the proper grant or title-papers (*titulo*) issue to them, and that the proceedings in the case be retained for the information and approval of the departmental assembly. These proceedings were numbered 131. In the order of concession of the governor, the name of one of the sisters,

Maria De Los Angeles, was erased, and over the erasure was written the name of Jose Bolcoff. This concession or grant of the governor was approved by the departmental assembly on the 22d of May, 1840. The approval in the records of the assembly has in it the number 131, and gives the date of the concession, and mentions the three sisters by name, as the parties to whom the concession was made. On the 13th of June following, the governor ordered a certificate of the approval to be given to the three sisters.

At this time, one Jose Castro was prefect of the first district, within which district the land granted was situated, and he kept a record or minute of the grants of land made in his district. His book of registry is now in the archives, in the custody of the surveyor general of the United States for California.

In this registry is entered a minute that, on the 8th day of April, 1839, the governor granted to the three sisters the place called El Refugio. In this registry there is also a similar minute of eight other grants, all of which are found in the archives, and each has a memorandum endorsed upon it that it has been entered in the registry.

The memoranda on these eight grants and the entries in the registry correspond.

There is also in the archives an index of grants made between 1838 and 1845, by a clerk in the office of the secretary of state of the department, and under his direction, which is commonly known as "Jimeno's Index." This index gives the number of the espedientes, the names of the grantees, and the designation of the lands granted. Upon the index against No. 131, is the entry of a grant of land designated as El Refugio, and the name of Jose Bolcoff is written over an erasure. It was admitted that originally the names of the three sisters were written there.

This was the documentary evidence which the complainant produced to show that a grant of the Rancho El Refugio was issued to the three sisters, under whom he claimed by sundry mesne conveyances.

Parol evidence produced by him, related chiefly to the possession of the premises since the concession of the governor, and various alleged admissions and acts of the sisters. It was also in evidence that in 1839 or 1840, the possession of the land was officially delivered to the three sisters, and that, in this proceed-

ing, called a delivery of juridical possession, Jose Bolcoff appeared on behalf of the sisters, and represented them.

The defendants asserted title to the premises through Jose Bolcoff; and of some portions of the premises they also alleged a conveyance or release from the sisters.

As documentary evidence of title they produced—

First. A paper purporting to be a grant of El Refugio to Jose Bolcoff, by Governor Alvarado, bearing date on the 7th of April, 1841.

It was shown that there was no trace of any such document as this in the archives of the department, except what appeared over the erasure in the index of Jimeno.

Second. A certificate of Governor Alvarado, dated July 28th, 1841, stating that the grant made on the 8th of April, 1839, in favor of Jose Bolcoff, was approved on the 22d of May, 1841, by the departmental assembly, and purporting to quote the language of the proceedings of that body. The certificate concluded by stating that it was issued to the party interested for his security, in consequence of the decree of the 13th of June preceding, existing in the espediente.

It is to be noticed by the reader that the certificate states that the grant made on the 8th of April, 1839, in favor of Jose Bolcoff, was approved on the 22d of May, 1841, while the alleged grant to Bolcoff produced bears date the 7th of April, 1841. The certificate purported further to quote the language used by the departmental assembly in this approval. It was shown that there was no session of the assembly in 1841: at least, that there was no evidence in the archives of the department that there was a session in that year; and if the year was erroneously given, and the approval of May 22d, 1840, was intended, that related only to the grant to the three sisters, who were therein designated by name, and no such language as that given was found on the journals of the assembly.

Third. A document purporting to be a record of juridical possession, given to Bolcoff July, 1842.

This document bears the signature of the prefect of the district and two attesting witnesses. It appeared in evidence that one of the witnesses was unable to write, and that the body of the entire document was in the handwriting of Bolcoff. The other witness testified that he added his signature in 1851, when the document was presented to him by Bolcoff, with a request that he should

sign it, inasmuch as he had not done so when the possession was given: that at this time the document had not the signature of the prefect or of the other witness, and Bolcoff stated that he was going to them for their signatures. Both of these witnesses testified emphatically that there never was but one juridical possession of the premises, and that this was delivered to the sisters. Bolcoff made oath before the land commissioner that the document was signed by all the parties in the year 1842.

Fourth. A diseno or sketch of the tract El Refugio; and,

Fifth. A patent of the United States, bearing date on the 4th of February, 1860, issued to Francisco and Juan Bolcoff, upon the confirmation of the alleged grant to Jose Bolcoff.

In 1822 one of the sisters, Maria Candida, intermarried with Jose Bolcoff, and in 1839 Maria de Los Angeles intermarried with one Majors. The three sisters lived together as members of the family of Bolcoff upon the land granted; Los Angeles until her marriage, and Jacinto until 1850, when she became a nun, and had not since resided upon the premises.

Since some time in 1850 Majors and his wife had occupied a portion of the tract, claiming possession under the concession to the sisters.

In 1852 Francisco Bolcoff and Juan Bolcoff, sons of Jose Bolcoff, presented a petition to the board of land commissioners, created under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, for a confirmation of the claim to El Refugio, asserted by them under the alleged grant to their father. In support of their claim they relied upon the alleged grant of Alvarado of April 7th, 1841, his certificate of approval by the departmental assembly, the record of juridical possession, and the sketch, which are mentioned above, with parol evidence of possession and cultivation. *No question was raised before the board as to the genuineness of these documents, and in January, 1855, the claim was confirmed.* An appeal from the decision was dismissed, and on the 4th of February, 1860, a patent of the United States was issued thereon.

In 1852 Majors presented, for himself, and on behalf of his wife, a petition to the board for a confirmation of her claim to one-third of the tract, under the cession to her and her sisters. In support of the claim they produced the petition to the governor, the reports thereon, the provisional grant of March 16th, 1839, the formal concession of April 8th, 1839, and the order of the governor of

June 13th, 1840, that a certificate of the approval of the assembly be issued to them.

The board rejected this claim, holding, in substance, that there was no evidence that any grant was issued to the sisters; that the decree of concession found in the archives was not proof of the delivery of a title to the parties interested; that until a document as evidence of the concession was issued and delivered to the grantees the favorable action of the departmental assembly did not establish their title, and the concession was not completed, and the property continued part of the public domain, subject to the disposition of the authorities of the government; and the board observed that this was the view of the governor and departmental assembly, as he had, notwithstanding the decree of concession to the sisters, made two years afterwards a grant of the same land to Bolcoff, which had been approved by the assembly.

The entire decision proceeded upon the supposition that the documents offered as evidence of Bolcoff's title were genuine, and that the officers of Mexico possessed the power to re-grant lands which had been once granted without their previous surrender by the first grantee, where the final title papers had not been issued to the grantee, although such grant had been approved by the departmental assembly.

The board in its opinion also spoke of a want of proof of performance of the usual conditions of cultivation and inhabitation; but this view was held upon the supposition that the residence and cultivation of Bolcoff and his wife and that of her sisters were under different grants. The commissioners held in confirming his claim that the proof showed cultivation of and residence upon the land. Subsequent to the action of the board upon these claims the registry of the prefect was discovered, and this discovery and other circumstances led to a critical inspection and examination of the documents upon which the claim of Bolcoff was founded, and finally to the bringing of this suit.

The position taken by the complainant was this: that a former grant, *a título*, or some documentary evidence of title based upon the concession of April 8th, 1839, was on the same day issued to the three sisters: that this *título* or grant passed into the custody of Bolcoff, and was some years afterwards suppressed or destroyed by him, with the intent to defraud the sisters of the property granted to them, and to secure the title to himself; that in the execution of this intent, the documents presented to the board of

commissioners, the grant purporting to be issued to him, the certificate of the approval of the departmental assembly, and the record of juridical possession, were fabricated by him, or others at his request, and the erasures made in the decree of concession to the sisters, and in Jimeno's Index; and that a claim confirmed, and a legal title obtained by these means, should be controlled for the benefit of parties equitably entitled to the property.

The defendants in the court below did not deny that the decree of concession was made to the sisters, but they contended that the interest of the sisters was exchanged with Bolcoff for an interest in a tract of land of which he had obtained a grant, and that in consequence of this exchange the grant of El Refugio was issued at their request to him instead of being issued to them. The agreement was stated to have been this: that Majors and wife should relinquish to Bolcoff their interest in El Refugio, and allow him to obtain a grant therefor in his own name; and in exchange for this that Bolcoff should relinquish to Majors his interest in a ranch known as St. Augustine, of which he had obtained a grant in 1833, and allow Majors to obtain a grant for the same, he paying Bolcoff in addition the sum of four hundred dollars. And it was alleged that this agreement was made after the intermarriage of Majors and Maria de los Angeles, and immediately carried into execution; that Majors and wife took possession of St. Augustine, and that afterwards, on the 7th of April, 1841, Maria Candida went personally to the governor and stated the agreement, when the governor, at her request, issued the grant to Bolcoff alone, and that the erasures in the decree of concession and in the index were at the time made by Jimeno, the secretary of State.

This statement of the defendants was contradicted by Majors, and was inconsistent with facts disclosed by the records. Majors obtained the ranch St. Augustine from Bolcoff by direct purchase, and the transfer to him was made before his marriage, and before the sisters had petitioned for El Refugio. The transfer to him is indorsed on the *espediente* of St. Augustine in the archives, and bears date on the 14th of January, 1839.

The alleged grant to Bolcoff of April 7th, 1841, made no allusion to any purchase or exchange with the sisters, or of any abandonment of their rights. It recited that he himself had *petitioned* for El Refugio.

The court below held that the documents upon which the claim

of Bolcoff was founded were all false, and were fabricated by Bolcoff, or some one at his instigation, to defraud the sisters of their property and secure the title to himelf; that by the false and fabricated documents, and the suppression or destruction of the grant to the sisters, a confirmation of the claim under the alleged grant to Bolcoff was obtained, and the legal title secured to his children; when in truth the real title was in the three sisters, and should have been adjudged to them: and it held that, under these circumstances, the patentees and all persons holding under them with notice of the claim of the sisters, should be decreed to surrender the title.

Besides insisting upon the genuineness of the alleged grant to Bolcoff, and other documents produced in support of his title, the defendants relied, as a defence to this suit, upon the following grounds:

First. That the claim of the complainant was a stale claim, and barred by the Statute of Limitations.

Second. That the complainant had no standing in court, by reason of the non-presentation of the claim of two of the sisters to the board of land commissioners for confirmation, and the rejection by the board of the claim of the other sister. And—

Third. That the defendants were *bona fide* purchasers of some portions of the property for a valuable consideration, without notice of the claim of the sisters; and for other portions had conveyances or releases from them.

The court below held—

1st. That to claim any benefit of the Statute of Limitations the defendants were required to state facts sufficient to bring the case within its operation, and then to insist that by reason of those facts the remedy of the complainant was barred, and that this had not been done by them in this case.

2d. That the presentation or non-presentation by the sisters of their claim under the grant to the board of land commissioners had nothing to do with the equitable relations between them and third parties; which relations were never submitted to the board for adjudication.

3d. That whilst equity would reach the perpetrator of the fraud in this case, and parties acquiring the property under him without consideration or with notice of the rights of the real owners, it would extend its protection to purchasers in good faith for a valuable consideration, without such notice.

The court below, therefore, directed that an interlocutory decree in favor of the complainant be entered and a reference be had to a master to report which of the defendants were *bona fide* purchasers, without notice of the claim of the sisters, and what parcels were so purchased, and also of what parcels the interest of the sisters or any of them had been conveyed to the defendants, with all necessary particulars; and that upon the coming in and confirmation of his report a final decree be entered directing the defendants to transfer to the complainant their title to all parcels, and undivided interests in parcels, not thus acquired and held.

The case accordingly went to a master, and his report having been confirmed, a final decree was entered, from which the defendants appealed to this court.

Messrs. W. H. Lamon and W. G. M. Davis for the appellants.

Mr. W. M. Stewart contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Claims to lands in California, by virtue of any right or title derived from the former government, were required to be presented to the land commissioners, and authority was vested in the commissioners to decide upon the validity of such claims, and to certify their decisions, with the reasons for the same, to the district attorney for the district.

Applicants for such confirmations were required to present their claims to the commissioners when sitting as a board: but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly *ex parte*, unless opposed by the district attorney.

Power to review such decisions was vested in the district court, on petition of the claimant, in case of rejection, or of the district attorney, in case of confirmation. (9 Stat. at Large, 633.)

Specific regulations were enacted as to the form of such petitions, and the provision was that the district court should proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as might be taken by the order of the said court; and that the court, on application of the party against whom judgment was rendered, should grant an appeal to the Supreme Court of the United States.

On the fifth of May, 1852, a petition, signed by the attorneys of Francisco Bolcoff and Juan Bolcoff, was filed with the land commissioners, setting up title to the Rancho El Refugio, as

grantees of their father, Jose Bolcoff, and asking for a confirmation of their claim under the act of Congress passed to settle such private claims to lands in that State. They represented that the tract was granted to their father during Mexican rule, by the governor of that department, under the colonization laws ordained by the supreme government.

Pursuant to the requirements of the act of Congress, they filed with their petition their documentary evidences of title, consisting of the following documents: (1.) A paper bearing date on the 7th of April, 1841, purporting to be a grant of the Rancho El Refugio to Jose Bolcoff, by Juan B. Alvarado, governor of the department at the date of the supposed grant. (2.) The certificate of Governor Alvarado, dated the twenty-eighth of July, 1841, stating that the grant made on the eighth of April, 1839, in favor of Jose Bolcoff, was approved on the twenty-second of May, 1841 by the departmental assembly. (3.) A document dated the twenty-sixth of July, 1842, purporting to be a record of juridical possession of the tract given to the supposed grantee by the proper Mexican authorities. (4.) The diseno or sketch of the tract described in the petition addressed to the governor by the original donee.

Proof of the handwriting of the persons whose names purport to be signed to the documents, was introduced by the petitioners, and as no question was made as to the authenticity of the documents, they were received as genuine, and treated as such in the hearing, and the commissioners entered a decree in favor of the petitioners, confirming the claim.

Both parties concede that an appeal was taken on behalf of the United States to the district court, but it was never prosecuted to effect, and was subsequently dismissed.

Patents may be issued for all claims confirmed by the commissioners, where no appeal was taken, the claimant complying with the conditions specified in the thirteenth section of the act providing for the adjudication of such claims; that is, he must present to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the land, duly certified and approved by the surveyor general. Such an application was accordingly made by the confirmees to the Commissioner of the General Land Office, and he, on the fourth of February, 1860, issued a patent in due form to the persons in whose favor the decree was entered, and to whom the certificate of confirmation

was granted. Title to the land is claimed by the appellants under that patent.

Attention will now be called to the evidences of title under which the appellee claims in this case. On the thirteenth of February, 1839, three orphans, daughters of Joaquin Castro, a deceased Mexican citizen, to wit, Maria Candida, Maria Jancinta and Maria de los Angeles, presented their petition to Juan B. Alvarado, governor of California, asking for a grant of the rancho El Refugio. Reference of the petition was made to the administrator of the adjoining mission, and he having reported on the sixteenth of March, 1839, that the land could be granted, as the land was not necessary to the mission, the governor, on the same day, made a provisional grant of the same to the petitioners and referred the *espediente* to the prefect of the district, as was the usual course in respect to such applications. Immediate attention was given to the subject by that officer, and on the twentieth of the same month he reported to the governor that the land was vacant, and recommended that the grant should be issued to the petitioners.

Evidently the several documents constituting the complete *espediente*, show a full compliance with all the requirements of the colonization laws, and it is quite clear that the case was so understood by the governor, as on the eighth of April, in the same year, he issued the concession in which the petitioners are declared to be the owners in fee of the land. Specific boundaries are given to the tract granted, and the directions in the same document are that the *espediente* be reserved for the consideration of the departmental assembly and their due approval of the same. Due report of the proceedings was made to that tribunal, and the record shows that on the twenty-second of May, 1840, they formally approved of the grant.

Satisfactory proof was introduced that Maria Candida intermarried with Jose Bolcoff, and that Maria de los Angeles intermarried with Joseph L. Majors. Prior to the marriage of Maria de los Angeles, the three sisters lived together as members of the family of Jose Bolcoff, the husband of the elder, and Maria Jacinta continued to reside in his family on the premises until 1850, when she became a nun and entered a convent.

By the record it appears that Joseph L. Majors, on the thirtieth of April, 1852, presented a petition to the commissioners claiming title in right of his wife to one-third of the rancho El Refugio, setting up the concession made by the governor to his wife and

her two sisters, and asked that the claim might be confirmed. In support of his claim he introduced the several documents referred to as tending to show that the concession to the three sisters was a valid grant of the rancho; but the commissioners on the thirtieth of January, 1855, rejected the claim, evidently proceeding upon the ground that the documents introduced by the other claimants were genuine.

Apart from that consideration the commissioners were doubtless much influenced by the testimony of the governor, who was examined as a witness by the successful claimants. He admitted that he granted the rancho in the first place to the three sisters, but he stated that he made the grant at the request of Maria Candida, the wife of Jose Bolcoff, and that he subsequently regranted the land to her husband at her request and upon her representation that an arrangement to that effect between her husband and the husband of her other married sister had been made. His statement was that he granted the new title to Jose Bolcoff because the parties agreed upon it, although he admitted that neither of the other two grantees ever came before him or made any such request.

Subsequent investigations led to the discovery that the documents or most of the documents, introduced in support of the claim of Jose Bolcoff, were forged and fraudulent, which induced the appellee, claiming title under the three sisters, to commence the present suit.

Confirmed as the claim of Jose Bolcoff was at the same time that the claim of the three sisters was rejected, they did not appeal nor would they have been benefited if they had, as the claim was confirmed to the other claimants and they were not parties in that litigation and could not appeal from the decree. Had all the facts and circumstances been known the unsuccessful claimant might perhaps have presented a petition to the district judge and have procured an injunction restraining the confirmees of the claim "from suing out a patent for the same until title thereto" had been "finally decided" but it is a sufficient answer to any such suggestion that the patent was issued before the alleged forgeries were discovered.

Remediless as the appellee was at law, he instituted the present suit in the circuit court. His theory is, as shown in the bill of complaint, that the grant was in fact made to the three sisters, and that their names were erased and the name of the successful

claimant inserted in the same, and that the commissioners were induced by false swearing, forgery, and fraud, to confirm the claim to the grantees of the party guilty of all those offences, as the means of his success and of the defeat of the claim of the three sisters, to whom the rancho really belonged.

All such charges are denied in the answer, but they are fully proved by the documents exhibited in the case, and by such facts and circumstances as leave no doubt in the mind of the court that the charges are true. Even the governor admits, in his deposition taken in this case, that the *espediente*, including the concession, was prepared in the name of the three sisters: but he states that when the *titulo* was prepared the wife of Jose Bolcoff came before him, and that upon her representation that her sisters were to receive an interest in another rancho, the title papers were made out in the name of her husband.

Such a theory is highly improbable, but the much better answer to it is that it is clearly and satisfactorily disproved. Beyond all doubt the entire *espediente*, except the *titulo*, was in the name of the three sisters, and the formal concession, which was also in their name, directed that the ultimate title should be issued to them and be recorded in the proper book; and discoveries made since the patent was issued show that the grant was entered in the Toma de Razon and in Jimeno's Index.

Much weight is due to those documents as evidences of title, even when they are not introduced in the particular case before the court. They were not produced before the commissioners, and it may be doubted whether they would have benefitted the case of the three sisters, if they had been, as their names are erased in the entry and the name of Jose Bolcoff written in their place, and as no suspicion of forgery or fraud existed at that time it may be doubted whether the production of the documents would have changed the result. Conjectures in that behalf, however, are of no avail, as it now appears that all or nearly all of the title papers introduced to support that title were forged and fraudulent, showing to the entire satisfaction of the court that the equity of the case was in the three sisters.

Further argument upon that topic is unnecessary, as the proofs are persuasive, convincing, and decisive. Detailed reference of them is given in the opinion delivered by the circuit court, and to that the parties can recur if they desire to examine the docu-

ments or the statements of the witnesses as exhibited in the depositions sent up in the record.

Suppose that is so, still it is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants. Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject matter, and its exercise is confided to their discretion, the decision of the matter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, but it is not important to enter much into that field of inquiry, as the fifteenth section of the act under which the commissioners were appointed provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States, or any patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons. (9 Stat. at Large, 634.)

Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain. (*United States* v. *Morillo*, 1 Wallace, 709; *Beard* v. *Federy*, 3 Wallace, 493; *United States* v. *Sanchez*, Hoffman, Land Cases, 133; *Martin* v. *United States*, Land Cases, 146; *United States* v. *Ortega*, Land Cases, 135.)

Argument is necessary to show that a patent in a suit at law is conclusive evidence of title against the United States, and all others claiming under the United States by a junior title. Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee. Persons claiming to hold the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belongs to another at the time the patent was issued. (*Bagnell* v. *Broderick*, 13 Peters, 436; *Patterson* v. *Winn*, 11 Wheaton, 380.)

Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. (*Stark* v. *Starr*, 6 Wallace, 419.)

Objection was taken in the court below that some of the respondents were innocent purchasers, but that objection cannot have

any weight at this time, as all the appellants before the court had notice of the title of the appellee, as clearly appears by the report of the master. None of those who purchased without notice are embraced in the decree.

Laches and the statute of limitations are set up in argument, but such defences cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered. *Decree affirmed.*

MR. JUSTICE FIELD did not sit in this case, nor participate in its decision.

MILLER ET AL. *v.* DALE ET AL.

October Term, 1875.—2 Otto, 473.

1. In an action of ejectment for land in California, where both parties assert title to the premises, the plaintiff under a concession of the former government, confirmed by the tribunals of the United States, and an approved survey under the act of Congress of June 14, 1860, and the defendant under a patent of the United States issued upon a similar confirmed concession, the inquiry of the court must extend to the character of the original concessions to ascertain which of the two titles gave the better right to the premises; and, if these do not furnish the means for settling the controversy, reference must be had to the proceedings before the tribunals and officers of the United States by which the claims of the parties were determined.
2. Where the original concessions in such cases were without specific boundaries, being floating grants for quantity, the one first located by an approved survey appropriated the land embraced by the survey.
3. The object of the proceeding before the tribunals of the United States for the approval of a survey of a confirmed claim to land in California under a Mexican or Spanish grant, pursuant to the act of Congress of June 14, 1860 (12 Stat., 34), was to insure conformity of the survey with the decree of confirmation, and not to settle any question of title against other claimants. The approval of the court established the fact that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it, and is conclusive as to the location of the land against all floating grants not previously located.

ERROR to the Supreme Court of the State of California.

Mr. S. O. Houghton for the plaintiffs in error.

Mr. Jeremiah S. Black contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action of ejectment for the possession of certain real property situated in the county of Santa Clara, in the State of California. The plaintiffs assert title to the premises under a concession of the former government, confirmed by the tribunals of the United States, and an approved survey under the act of Congress of June 14, 1860. (12 Stat., 34, sect. 5.)

That act gives to an approved survey upon a confirmed claim the effect and validity of a patent. Some question is made whether this effect can be given to a survey approved like the one here since the repeal of the act, notwithstanding the reservation of jurisdiction in pending cases by the repealing clause. We do not deem it material to determine the question, and, for the purposes of this case, shall consider that the plaintiffs stand before the court upon a title as fully established as if supported by a patent. The confirmation under which they claim was made by the District Court of the United States in January, 1859, and the survey was approved by that court in June, 1865, and, on appeal, by the Circuit Court in September, 1866.

The defendants assert title to the premises under a patent issued upon a concession of the Mexican government, confirmed by the tribunals of the United States, the confirmation dating in March, 1857, and the patent being issued in January, 1859. The approved survey of the plaintiffs and the patent of the defendants both include the land in controversy. The question, therefore, for consideration is, which of the two titles gave the better right to the premises. To answer this question we must look into the character of the orignal concessions, and if they furnish no guide to a just conclusion, we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined.

Looking at the original concessions, we find that they were mere licenses to settle upon and occupy vacant lands of the former government, without designation as to locality, except in the most vague and general way. It appears that one Mariano Castro, through whom the plaintiffs trace their title, had, as early as 1802, obtained permission from the viceroy of Mexico to settle upon a tract of land within the jurisdiction of Monterey, known as La Brea; but, objection to his settlement there being made by the priests of the adjoining mission, he was directed to select another tract. He accordingly solicited of the military commander of the

district the tract called El Carneadero, alleged to be the same tract since known as Las Animas, but whether any action was ever taken by the public authorities upon his petition, further than to hear objections also made by the priests to his settlement there, we are not informed; and the archives of the department, searched by direction of the governor, disclose nothing on the subject. After Castro's death, his widow, in 1833, in a petition to the governor, represented that her husband had taken possession of the tract, Las Animas, in 1806, under a concession from the governor, but that she had not the title papers, and asked that a title be issued to her. In 1835 her attorney renewed the application, affirming that the land had been granted to her husband, but that the title papers had been destroyed by fire. Upon receipt of this petition the governor ordered a search among the archives of the department for a record of the alleged concession; but, as already stated, none was found. In consideration, however, of the evidence which they afforded of the right to the tract under the name of La Brea, obtained by the deceased from the vice-royal government in 1802, the governor directed that a certificate or testimonial of the record in the case (*expediente*) be issued for the protection of the parties interested; and, as the boundaries had not been expressly defined within which they must confine themselves, he added that those set forth in the plat accompanying the petition of the attorney should in future be regarded as such, with a reservation, however, of the rights of any third party who might feel aggrieved by the proceeding. This certificate or testimonial, issued in 1835, with the documents upon which it was founded, constituted the record evidence of the concession upon which the confirmation and survey were had, under which the plaintiffs claim.

Previous to the issue of this document, and in 1831, another person by the same name, Mariano Castro, under whom the defendants claim, had obtained from the governor of California a license to occupy for cultivation a tract of land called El Solis. Under this license he went into possession of vacant land, and remained in possession until the cession of the country to the United States. His widow and children obtained the decree of confirmation and patent.

Neither of the concessions transferred the title, or conferred upon the grantees any interest in the land occupied by them other than a right of possession during the pleasure of the gov-

ernment. Their possession under these licenses did not raise even an equity in their favor against the United States. (*Serrano* v. *United States*, 5 Wall., 461.)

In this condition of the property the party who first obtained a confirmation of his claim, and its definite location by an approved survey, took the title to the land embraced by the survey. But independent of this position, if we could regard the original concessions—the one issued to the first Castro in 1802, and the one issued to the second Castro in 1831—as ordinary grants of the governor of the department, and, as such, passing a title, though of an imperfect character, to the grantees, the same result would follow, for they could then be treated only as floating grants. Neither of them gave any definite boundaries to the tract referred to by the general designation of place, and neither specified any quantity; that was only a matter of inference from subsequent documents. And equal vagueness as to the location and extent of the land solicited characterized the petitions of the parties. That of the first Castro only stated that La Brea was situated within the jurisdiction of Monterey, and distant three or four leagues from any mission or pueblo. The term appears to have been applied to a large region of country in that district. The petition of the second Castro only describes El Solis, the tract which he desired, as a place within the jurisdiction of the same military post. Under these circumstances, the concessions being without specific boundaries by which the quantity embraced, when ascertained, could be indentified, the only rule which the court can follow in actions at law is to consider the one first located by an approved survey as having appropriated the land covered by the survey. This rule was substantially recognized in one of the earliest cases which came before this court for consideration—the *Fremont case*, reported in the 17th of Howard. The grant to Alvarado, under which Fremont claimed, was for ten leagues within exterior boundaries embracing a much greater quantity; and while the court held that, as between the government and the grantee, the grant passed to him a right to the quantity of land mentioned to be laid off by official authority in the territory described, it said, "that if any other person within those limits had afterwards obtained a grant from the government by specific boundaries before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado." As between the individual claimants from the gov-

ernment the court added, "the title of the party who had obtained a grant for the specific land would be the superior and better one; for, by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described until after he had made his survey."

Referring to this language in the recent case of *Henshaw* v. *Bissell*, 18 Wall., 267, we observed that "a second floating grant, the claim under which is first surveyed and patented, and thus severed from the public domain, would seem to stand, with reference to an earlier floating grant within the same general limits, in the position which the subsequent grant, with specific boundaries mentioned in the citation, would have stood to the general grant to Alvarado."

Upon this rule the land department of our government constantly acts with reference to floating warrants issued under the legislation of Congress to soldiers and others. The warrant first located takes the land, though it bear date only of yesterday. The date of the warrant is of no moment. So with Mexican floating grants, except that they are usually confined within certain general limits, the one first located takes the land. Here the survey of the defendants was made and approved in 1858, several years before the approval of the survey under which the plaintiffs claim.

It is contended with much earnestness that the fact that the survey of the plaintiffs received the approval of the District and Circuit Courts of the United States gave it conclusive efficacy upon the title, and determined that it was superior to that of the defendants. This position is based upon a misconception of the object of subjecting surveys of confirmed claims under Mexican concessions to the consideration of the court. It was not to settle the question of title. So important a matter affecting the rights of parties as that would hardly have been left to proceedings of a summary character. The object of the proceeding was to insure conformity of the survey with the decree upon which it was made. If the decree gave specific boundaries the court was to see that the survey followed them; if the decree was for quantity the court was to see that the survey did not embrace a greater quantity—that the land was taken in a compact form; or if the grantee had himself exercised a right of selection, and had settled upon and improved particular parcels, or sold parcels to others, that the survey, if practicable, included such parcels, and also

that it was made with proper regard to the rights of others who had settled upon the land, especially when they had been induced to make improvements by the grantee himself. Original surveys were left entirely to the action of the local surveyor and the land department. Great complaints were sometimes made that surveys thus established were unjustly extended in directions so as to include the settlements and improvements of others, and contests over them were in consequence often prolonged for years. To prevent possible abuses in this way the act of Congress of June 14, 1860, was passed, allowing surveys, when objection was made to their correctness, to be brought before the court and subjected to examination, and requiring them to be corrected if found to vary from the specific directions of the decrees upon which they were founded: or, if the decrees contained no specific directions, from the general rules governing in such cases. The approval of the court established the fact that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it, and in either case the approval rendered the survey conclusive as to the location of the land against all floating grants not previously located. The questions then left for controversy before the courts related to the title of the property, the parties proceeding upon the established conformity of their respective surveys with the decrees upon which they were founded.

The case of *Henshaw* v. *Bissell*, upon which counsel seem to rely, does not militate against the views here stated. The question there was, not as to which of two floating grants carried the premises. Only one of the grants there under consideration, was floating. The other grant had specific boundaries, or such descriptive features as to render its limits easily ascertainable; and the court held that the right of the grantee to the land thus designated could not be interfered with by the donee of the floating grant. A grant of that specific description necessarily carried the land described, unless appropriated by an earlier grant; and no subsequent location of a floating grant upon the premises could impair the title.

It is urged that the testimonials issued in 1835, although intended primarily as evidence of the proceedings taken in 1802, and of the license granted by the viceroy of Mexico, established the boundaries of the settlement of the first Castro; so that, from that time, the license ceased to be a general and floating one, and

became a license to occupy a specific tract. Admitting this view of the effect of the testimonial to be correct, the answer is obvious—the title of the grantee or licensee was not changed by a limitation of his right of occupation to a specific tract; and the designation of the boundaries reserved the rights of any third party, which were to be left uninjured—that is, not encroached upon. The second Castro was then in possession of a portion of the tract within those boundaries, his right being of the same character—that of occupancy by permission of the government. The decree confirming his claim, and the survey following it, approved by the land department, are conclusive as to the extent of his possession. The plaintiff shows no better claim to the premises thus possessed by producing a testimonial establishing the boundaries of his settlement, which, at the same time, provided that existing rights of others should remain unaffected by the proceeding.

It was suggested on the argument that the decree confirming the concession of the El Solis rancho, was obtained upon an erroneous and fraudulent translation of certain documents introduced into the case, which, if correctly translated, would have defeated the claim, by showing that the concession was denied instead of being made by the Mexican government.

If this be so, the plaintiffs can proceed in equity, where the land has not passed to *bona fide* purchasers without notice, to remove the obstacle to the operation of their title arising from the defendants' patent, or to compel the patentees to hold the land in trust for their benefit, or in some other appropriate way. But in this action of ejectment the plaintiffs must rely upon their legal title, and that arising subsequent to the title of the defendants, they cannot recover. *Judgment affirmed.*

ACTS OF CONGRESS CONSTRUED OR CITED.

Sept. 24, 1789.	Judiciary act, 24th section. 1 Stat., 85.—667.
Sept. 24, 1789.	Judiciary act. 25th section. 1 Stat.. 85.—30, 113, 149, 178, 281, 470, 503, 594, 671, 715, 718, 720, 736.
May 18, 1796.	Providing for the survey and sale of the public lands. 1 Stat., 464.—48, 546.
June 1, 1796.	Regulating grants of land. 1 Stat.. 491.—548.
April 7, 1798.	Authorizing the establishment of a government in the Mississippi Territory. 1 Stat., 549.—517.
May 3, 1798.	Providing for the further defence of the ports and harbors of the United States. 1 Stat., 554.—34.
March 1, 1800.	Relating to the location of bounty land warrants, &c. 2 Stat., 14.—563.
May 10, 1800.	Providing for the sale of the public lands. 2 Stat., 73.—48, 64, 71.
March 3, 1803.	Regulating grants of land, &c. 2 Stat., 229.—548, 671.
March 26, 1804.	An act making provision for the disposal of the
Feb. 11, 1805.	An act concerning the mode of surveying the public lands of the United States. 2 Stat., 313.—546. public lands in the Indiana Territory. 2 Stat., 277.—48, 463, 548.
March 2, 1805.	An act for ascertaining and adjusting private land claims in Louisiana. 2 Stat., 324.—49.
April 21, 1806.	An act for ascertaining and adjusting private land claims in Louisiana. 2 Stat., 391.—49.
April 21, 1806.	Relating to donation entries in Mississippi. 2 Stat., 400.—678.
April 21, 1806.	An act for establishing trading houses with the Indian tribes. 2 Stat., 402.—34.
March 3, 1807.	Providing for the disposal of public lands. 2 Stat., 448.—463.
June 14, 1809.	Providing for the erection of fortifications, &c. 2 Stat., 547.—34.
June 15, 1809.	Establishing a land office in the Mississippi Territory. 2 Stat.. 548.—49.
Feb. 20, 1811.	Providing for the admission of Louisiana into the Union. 2 Stat., 642.—195, 548.
March 3, 1811.	Providing for the final adjustment of claims to lands, and for the sale of the public lands in Louisiana. 2 Stat., 662.—43, 49, 387, 451, 548.

Feb. 20, 1812. For the revision of former confirmations of private land claims in Illinois. 2 Stat., 677.—652.

April 8, 1812. Admitting the State of Louisiana into the Union. 2 Stat.. 701.—523, 548.

April 14, 1812. An act to enlarge the limits of the State of Louisiana. 2 Stat., 708.—519.

April 25, 1812. An act for ascertaining the titles and claims to lands in Louisiana. east of the river Mississippi. 2 Stat., 713.—179.

April 25, 1812. An act to establish the General Land Office. 2 Stat., 717.—588.

May 6, 1812. An act to provide for designating, surveying, and granting the military bounty lands. 2 Stat., 728. —569, 574.

June 4, 1812. Providing for the government of the Territory of Missouri. 2 Stat., 743.—548.

June 13, 1812. Providing for settling the claims to land in Missouri. 2 Stat., 748.—163, 529, 680.

Feb. 12, 1813. Authorizing the President to take possession of West Florida. 3 Stats., 472.—519.

March 3, 1813. Relating to private land claims in Missouri. 2 Stat., 813.—665.

April 12, 1814. Providing for the final adjustment of land titles in Louisiana and Missouri, &c. 3 Stat., 121.—174, 507, 738, 758.

Feb. 17, 1815. For the relief of the inhabitants of New Madrid. 3 Stat., 211.—656, 665.

March 5, 1816. Granting bounty lands to Canadian volunteers. 3 Stat., 256.—571.

April 16, 1816. Granting bounty lands, &c. 3 Stat., 285.—562.

March 1, 1817. Providing for the admission of Mississippi into the Union. 3 Stat., 348.—548.

March 3, 1817. Providing for the government of the Territory o Alabama. 3 Stat., 371.—517.

March 3, 1817. Relating to the Creek treaty of August 9, 1814. 3 Stat., 380.—648.

March 3, 1817. Allowing further time for entering donation rights in Michigan. 3 Stat., 390.—64.

Dec. 10, 1817. Admitting Mississippi into the Union. 3 Stat., 472.—519.

March 9, 1818. Authorizing certain purchasers of public lands to withdraw their entries, &c. 6 Stat., 200.—64.

March 2, 1819. Providing for the admission of Alabama into the Union. 3 Stat., 489.—49, 518.

March 3, 1819. For adjusting claims to land, &c. 3 Stat., 528.—65. 180.

Dec. 14, 1819. Admitting Alabama into the Union. 3 Stat., 608, 519.

March 6, 1820. Providing for the admission of Missouri into the Union. 3 Stat., 545.—52, 369, 451, 529.

April 24, 1820. An act making further provision for the sale of the public lands. 3 Stat.. 566.—27, 65, 66, 71, 595.

May 8, 1820. For the relief of the legal representatives of Henry Willis. 6 Stat., 246.—62.

May 11, 1820. Providing for the adjustment of land claims in Louisiana. 3 Stat., 573.—737.

April 26, 1822. Relating to the location of New Madrid certificates. 3 Stat., 668.—58.

May 8, 1822. For adjusting claims to land. 3 Stat., 707.—180.

May 26, 1824. Granting land to the city of Mobile, &c. 4 Stat., 66.—509.

May 20, 1826. Relating to the selection of school lands. 4 Stat., 179.—466, 494.

May 22, 1826. Authorizing the re-location of certain bounty lands. 4 Stat., 190.—574.

March 3, 1827. For the relief of the legal representatives of Giles Egerton. 6 Stat.. 366.—645.

May 23, 1828. For the relief of certain purchasers of public land. 4 Stat., 286.—561.

May 24, 1828. Confirming private land claim to Francois Valle and others. 6 Stat., 386.—451.

May 28, 1830. Relating to the removal of certain tribes of Indians. 4 Stat.. 412.—299.

May 29, 1830. Granting pre-emption rights. 4 Stat., 420.—24, 29, 77, 97, 113, 126, 172, 319, 505, 566, 721.

March 2, 1831. Granting land to Arkansas. 4 Stat., 473.—99.

March 3, 1831. To create the office of surveyor-general for Louisiana, &c. 4 Stat., 492.—182.

April 5, 1832. Pre-emption act. 4 Stat., 503.—107, 130.

June 15, 1832. Granting one thousand acres of land to Arkansas 4 Stat.. 531.—86, 97, 112.

July 4, 1832. Granting land to Arkansas. 4 Stat.. 563.—99.

July 9, 1832. Providing for the final adjustment of private land claims in Missouri. 4 Stat., 565.—57, 679.

July 14, 1832. Pre-emption act. 4 Stat., 603.—97, 113, 126, 566.

March 2, 1833. Providing for the final adjustment of land claims in Missouri. 4 Stat., 661.—679.

March 2, 1833. Authorizing the sale of land granted to Arkansas. 4 Stat., 667.—109.

June 19, 1834. Reviving pre-emption act of 1830. 4 Stat., 678.—32, 132, 505, 566.

June 26, 1834. Relating to the sale of lands in Illinois. 4 Stat., 687.—35.

June 30, 1834. Prohibiting settlement on Indian reservations. 4 Stat., 730.—397.

May 20, 1836. An act to give effect to patents for public lands issued in the names of deceased persons. 5 Stat., 31.—249, 260, 269, 579.

June 15, 1836. Providing for the admission of Michigan into the Union. 5 Stat., 49.—195.

June 23, 1836. Providing for the admission of Arkansas into the Union. 5 Stat., 58.—52. 492.

June 23, 1836. Providing for the admission of Michigan into the Union. 5 Stat., 59.—318, 459.

July 2, 1836. Providing for laying off the town of Fort Madison, &c. 5 Stat., 70.—725.

July 2, 1836. Confirming the sales of public lands in certain cases. 5 Stat., 73.—37, 532.

July 2, 1836. An act for the relief of William Pollard's heirs. 6 Stat., 680.—509.

July 4, 1836. An act to reorganize the General Land Office. 5 Stat., 107.—139, 150, 589, 621.

July 4, 1836. Confirming private land claims in Missouri. 5 Stat., 127.—58.

January 9, 1837. Providing for the disposition of the proceeds of ceded Indian lands. 5 Stat., 135.—398.

March 3, 1837. Providing for laying off the town of Fort Madison, &c. 5 Stat., 178.—725.

March 3, 1837. Relating to Choctaw treaty of 1830. 5 Stat., 180.—286.

June 22, 1838. Pre-emption act. 5 Stat., 251.—15, 172, 319.

March 3, 1841. Authorizing recorder to sign land patents. 5 Stat., 416.—590.

Sept. 4, 1841. Granting land to the States for purposes of internal improvement. 5 Stat., 455.—161, 502, 721.

Sept. 4, 1841. Pre-emption act. 5 Stat., 455.—1, 44, 54, 75, 88, 96, 124, 133, 143, 168, 183, 200, 208, 211, 469, 640, 680, 747.

July 7, 1842. Relating to the location of bounty land warrants. 5 Stat., 497.—563.

August 23, 1842. Relating to Choctaw treaty of 1830. 5 Stat., 515.—286.

March 3, 1843. Relating to pre-emption rights, &c. 5 Stat., 620.—143.

March 3, 1843. Relating to exemplifications of records of the General Land Office. 5 Stat., 627.—586.

May 23, 1844. Town site act. 5 Stat., 657.—196, 269.

August 3, 1846. Providing for the adjustment of suspended pre-emption claims. 9 Stat., 51.—502.

August 6, 1846. Providing for the admission of Wisconsin into the Union. 9 Stat., 56.—488.

Feb. 11, 1847. Granting bounty land warrants. 9 Stat., 123.—561, 563.

March 1, 1847. Providing for the sale of mineral lands in Michigan. 9 Stat., 146.—464, 465.

May 29, 1848. Admitting Wisconsin into the Union. 9 Stat., 233.—489.

March 3, 1849. Establishing the Interior Department. 9 Stat., 395.—139.

March 3, 1849. Establishing the Territorial government of Minnesota. 9 Stat., 403.—469.

Sept. 26, 1850. Relating to the sale of mineral lands in Michigan. 9 Stat., 472.—464, 465.

Sept. 27, 1850. Oregon donation act. 9 Stat., 496.—241, 249, 261.

Sept. 28, 1850. Swamp land grant. 9 Stat., 519.—430, 435, 442, 448.

Sept. 28, 1850. Granting bounty land warrants. 9 Stat., 520.—565.

March 3, 1851. Allowing pre-emptions on the "Bastrop Grant" in Louisiana. 9 Stat., 597.—130.

March 3, 1851. An act to ascertain and settle the private land claims in California. 9 Stat., 631.—2, 60, 385, 500, 588, 599, 608, 632, 777.

March 22, 1852. Making land warrants assignable. 10 Stat., 3.—565, 706, 741.

June 10, 1852. Granting land to Missouri for railroads. 10 Stat., 8.—350, 435, 443.

March 3, 1853. Extending pre-emption rights to certain lands. 10 Stat., 244.—62, 168, 384, 387, 641.

March 3, 1853. Providing for the survey of the public lands in California, &c. 10 Stat., 246.—76, 87, 95, 387, 493, 496.

March 1, 1854. An act for the extension of the pre-emption privilege in California. 10 Stat., 268.—76.

April 6, 1854. Authorizing the entry of the town site of Council Bluffs, Iowa. 10 Stat., 273.—274.

May 30, 1854. Organizing the Territories of Nebraska and Kansas. 10 Stat., 277.—47, 183, 492.

June 29, 1854. Granting land to Minnesota for railroads. 10 Stat., 302.—338.

July 17, 1854. Authorizing the issue of Sioux half-breed scrip. 10 Stat., 304.—333, 584.

July 22, 1854. Establishing the offices of Surveyor General of New Mexico, Kansas, and Nebraska. 10 Stat., 308.—43, 50, 300.

August 3, 1854. An act to vest in the several States and Territories the title in fee of the lands which have been or may be certified to them. 10 Stat., 346.—394.

August 4, 1854. Graduating the price of the public lands. 10 Stat., 574.—130.

August 4, 1854. Repealing railroad land grant to Minnesota. 10 Stat., 575.—338.

August 4, 1854. Extending the right of pre-emption over unsurveyed lands in Minnesota. 10 Stat., 576.—138, 470.

March 2, 1855. For the relief of purchasers of swamp lands. 10 Stat., 634.—431, 450.

May 15, 1856. Granting land to Iowa for railroads. 11 Stat., 9.—373, 430.

June 3, 1856. Granting land to Wisconsin for railroads. 11 Stat., 20.—66, 354.

Feb. 26, 1857. Providing for the admission of Minnesota into the Union. 11 Stat., 166.—221, 469.

March 3, 1857. Establishing additional land districts in Nebraska. 11 Stat., 186.—45, 51.

March 3, 1857. Granting land to Minnesota for railroads. 11 Stat., 195.—543.

March 3, 1857. Confirming swamp land selections. 11 Stat., 251.—432, 442, 447.

May 11, 1858. Admitting Minnesota into the Union. 11 Stat. 285.—336.

May 19, 1858. Relating to Sioux half-breed scrip. 11 Stat., 292.—334.

June 12, 1858. Relating to appeals from decisions of Registers and Receivers. 11 Stat., 326, Sec. 10.—142.

May 26, 1860. To settle titles to lands set apart for half-breed Kansas Indians. 12 Stat., 21.—291.

June 14. 1860. Relating to the survey and location of confirmed private land claims in California. 12 Stat., 33.—599, 621, 784.

Jan. 29, 1861. Admitting Kansas into the Union. 12 Stat., 126.—52.

March 2, 1861. Confirming the titles of purchasers of certain lands in Iowa. 12 Stat., 251.—261.

April 25, 1862. Amending act of June 3, 1856, granting land to Wisconsin for railroads. 12 Stat., 618.—67.

May 20, 1862. An act to secure homesteads to actual settlers on the public domain. 12 Stat., 392.—217, 219, 224, 230, 232, 237.

May 30, 1862. Relating to settlement on unsurveyed lands. 12 Stat., 410.—76.

July 1, 1862. Granting land to the Pacific Railroads and branches, 12 Stat., 489.—383, 415, 422, 424, 685.

July 12, 1862. Confirming a land claim in the State of Iowa, &c., 12 Stat., 543.—261.

March 3, 1863. Granting land to Kansas for railroads. 12 Stat., 772.—389.

March 3, 1863. Granting the right of pre-emption to certain purchasers on the "Soscol Ranch," in California. 12 Stat., 808.—1.

March 21, 1864. Providing for the admission of Nevada into the Union. 13 Stat., 30.—476.

April 19, 1864. Providing for the admission of Nebraska into the Union. 13 Stat., 47.—45, 52.

May 5, 1864. Granting land to Wisconsin for railroads. 13 Stat., 66.—355.

May 28, 1864. For the relief of the citizens of Denver, Colorado. 13 Stat., 94.—269.

June 30, 1864. Granting the Yosemite Valley to California. 13 Stat., 325.—74.

July 2, 1864. Amending the act of July 1, 1862, granting land to the Pacific Railroads and branches. 13 Stat., 356.—384, 414, 425, 686.

July 2, 1864. Granting land to Burlington & Missouri River Railroad, in Nebraska. 13 Stat., 364, sect. 19.—414.

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INDEX.

ABANDONMENT.
Of possession of public land an abandonment of the claim, 8.
Of pre-emption claim, what constitutes, 140.

ACCEPTANCE.
Of patent presumed, 602, 608.
When in condition for, 609.

ACCRETIONS.
On navigable waters, ownership of, 529, 534.

ACTIONS AT LAW. See *Ejectment*.

ADJUDICATIONS. See *Land Officers*.

ADMINISTRATOR.
Assignment of land warrant by, 559, 561.
certificate of entry by, 561.

ADVERSE POSSESSION. See *Statutes of Limitations*.

AGENT.
Land entered by, after death of principal, 569.

AGREEMENTS. See *Contracts*.

ALIEN.
May pre-empt, when, 744.

ALIENATION.
A mortgage is not, 232.
Of possessory claims on public land, 8–14, 274.
Of land before entry, 249, 261.
Of "floats," or the right to enter land, 566, 569, 576.

ALIENATION, RESTRAINT UPON.
By homestead act, 230.
By pre-emption act, 124, 129, 130.
By Indian treaties, 291, 296, 297, 298.
By Oregon donation act, 261.
By acts granting land warrants, 561, 569.

AMENDED ENTRY.
A new entry, 714.

APPEAL.
While pending, land not subject to entry, 170.
To supreme court from State courts, 715.

APPLICATION.
To enter land must conform to the statute, 169, 170.
Of funds arising from sale of school lands, 467.

APPROPRIATION.
Of public land, what constitutes, 29, 33, 105, 307, 328, 434, 489, 651, 661.

ASSIGNMENT.
Of pre-emption right, 124, 129.
Forged on land warrant, 706, 708.
Of land warrant obtained by fraud, 550, 706, 708.
implied warranty in, 707.
guarantee in, 707.
in blank, 708.
by administrator, 559.
by executor, 550.
by guardian, 561.
by heirs, 561.

ASSIGNMENT OF CERTIFICATE OF ENTRY.
By administrator, 561.
After judgment against owner, 728.
After execution of title bond, 728.
Obtained by fraud, 728.
As collateral security, 728.
No implied warranty of title to land in assignment of, 728.
Passes title to the land, 728.
State recording laws do not apply to, 728.

ASSUMED NAME.
Entry made in, valid, 750.

ATTACKING A PATENT.
Who may, 94, 199.

ATTORNEY.
Sale of floats by powers of, 566, 569, 582.
Power of, revoked by death of principal, 568.

AUTHENTICATION.
Of records of land office, mode of, 200, 205.

BANKRUPTCY.
Improvements on public land pass to assignee in, 11.

BANKS AND BEDS OF RIVERS. See *Riparian Rights.*

BEGINNING SETTLEMENT.
What is, 9.

BILL IN EQUITY.
By U. S. to set aside patent, 414.

BLANK ASSIGNMENTS.
Of land warrants, 708.

BONA FIDE POSSESSION.
What constitutes, 3, 117.

BONA FIDE PURCHASERS.
Who are, and when protected, 105, 114, 182, 284, 553, 708.
Who are not, and when not protected, 198, 552, 579, 742.
Jurisdiction of the supreme court on questions of, 114.

BONA FIDE RESIDENCE.
What constitutes, 190.

BONA FIDE SETTLEMENT.
What constitutes, 4, 117, 205, 209, 218.

BOUNDARY LINE.
House of pre-emptor on, 15, 116, 241.
Of surveys on navigable waters, 529, 531, 547.

BOUNTY LAND WARRANTS.
Not commercial paper, 706.
Assignment of, necessary to pass title, 708.
Equitable title passes without assignment, 708.
Guarantee in sale of, 707.
Implied warrantee in sale of, 707.
Issued by mistake, 553.
Obtained on forged papers, 564 706, 708.
Forgery of assignment of, 708.
Assignment of by administrator, 559.
executor, 550.
heirs, 561.
Restraint upon sale of, before issued, 563.
land located with, 561, 569, 574.
Taxation of land located with, 703, 708.

BREACH OF CONDITIONS.
In grant of land to railroads, 354.

BUILDINGS.
On public lands, 8–13.

BURDEN OF PROOF.
In actions in courts, 212, 430, 435.

CANCELLING.
An entry, not evidence of its illegality, 216.
A patent issued by mistake, 594.
Rescinding a cancellation, effect of, 708.

CERTIFICATE OF ENTRY. See *Assignment of.*
Title acquired by, 725.

CERTIFIED COPIES.
Of records of land office, mode of authentication, 205.

CHANGE OF ENTRY.
A new entry, 711.
In what cases allowed, 714.
Cannot be made to land sold to another, 714.

CHANCERY. See *Equity*.

CITIZENSHIP.
Of pre-emptors, 170, 744.

CLAIMS ON PUBLIC LANDS, 8—15.

"CLAIMED OR HELD BY INDIVIDUALS"
Terms construed, 447.

CLERICAL MISTAKES.
In issuing patent, may be corrected, 594, 607

COLOR OF TITLE.
Under occupying claimant law, 750.

COMBINATION.
To prevent bidding at public land sales, 192.

COMMISSION OF OFFICER.
The word "from" excludes the day of date, 307.

COMMISSIONER OF GEN. LAND OFFICE. See *Land Officers*.

COMMISSIONER OF PENSIONS.
Power of to cancel land warrants, 565.

COMMON LAW.
Extended to territory ceded by Georgia, 518.

COMMUTING.
Homestead entry under 8th section, not changed to pre-emption entry, 224.

CONDITIONAL ENTRY.
Of public lands not permitted, 714.

CONDITIONS.
Precedent in grants, 335.
Subsequent in grants, 356, 373.

CONFIRMEE.
Of private land claim entitled to possession of all land claimed until approval of survey, 61.

CONFIRMING ACTS
Construed, 37, 53, 58, 261, 449, 451, 532, 736.

CONFIRMING TITLES.
Where patents have issued to deceased persons, 249, 260.

CONFIRMING SWAMP LAND SELECTIONS, 434, 442, 447, 450.

CONFIRMING STATE SELECTIONS IN CALIFORNIA, 496.

CONGRESS. See *Acts of Cited.*
Power of, to repeal grants, 335.
Cannot nullify titles, 656.
Power of, to repeal Indian treaties, 331.
Power of, to dispose of public lands, 167, 315, 326, 515, 656, 661, 663, 764.

CONTRACTS.
Relating to possessory rights on public land, 8—15, 261, 269.
By settlers on town sites, 274.
For sale of land before entry, 261.
By joint pre-emption settlers, 133, 141, 229.
By pre-emptor before entry, 130, 141.
By homestead settlers, 224.
By settlers under graduation act, 130.
For sale of pre-emption floats, 568.
By Indian reservees, 297, 298.

CONVEYANCE. See *Alienation.*

COURTS.
Jurisdiction of to review decisions of land officers, 15, 29, 42, 55, 97, 112, 142, 153, 159, 169, 173, 213, 469, 550, 635, 640.
Will not take jurisdiction while claims are pending before the land office, 170

COVENANTS.
In deed construed, 249.
By treaty-making power, 331.

CROPS. See *Growing Crops.*

CULTIVATION.
Required by Oregon Donation Act, may be performed by friends or servants, 241.

DEATH.
Of homestead settler, title vests in widow, 237.
Of patentee, before issue of patent, 249.

DECISIONS. See *Land Officers.*

DECLARATORY STATEMENT. By Pre-emptor.
Failure to file within time required, 157.
Second filing on unoffered land, 142.
As to time of settlement, 133, 744.
The entry of land, not included in filing, 171.

DEEDS. See *Alienation.*
Void when prohibited by law, 296, 297.
With warranty, before entry, 130.
By quit-claim, before entry, 130, 249, 296.

DELIVERY OF PATENT.
Not necessary to pass title, 598, 601, 608, 633.

DEFECTS.
In entry cured by patent, 553.

DESCENT.
By homestead law, 237, 240.

DESCRIPTION.
Of land in patent controls in ejectment, 24.

DOWER.
Of widow in land sold by husband before entry, 130.

DWELLING-HOUSE.
Of pre-emptor on quarter-section line, 15, 116, 241.

EJECTMENT.
By settlers on public land, 10, 11.
Patents, void in, 42, 55, 87, 307, 314, 320, 341, 447, 502, 644.
On conflicting patents, 643, 671, 783.
Questions of fraud cannot be raised in, 199.

EJECTMENT IN STATE COURTS.
On equitable title, 671, 679, 685, 767.

EJECTMENT IN U. S. COURTS.
Can be maintained only on legal title, 332, 656, 663, 664, 759.

EMINENT DOMAIN.
Within the limits of a State, 508.

ENTRY.
The term defined, 62.
In making, the statute must be followed, 169.
Conditional, not permitted, 714.
In an assumed name, valid, 750.
By agent after death of principal, 569.
Of land on navigable waters, 508, 531, 534, 535, 550.
When void, 29, 132, 171, 198, 327, 714.
Made according to public survey, 15, 24.
Survey cannot be changed after, 15.
Mistakes in, 728, 736.
If valid, gives equitable title, 216, 728.
Obtained by fraud, 171.
Change of, 710, 714.
Re-entry a new entry, 707.

EQUITABLE LIEN.
By assignment of certificate of entry, 728.

EQUITABLE MORTGAGE.
Contract before entry, 269.

EQUITABLE TITLE.
When acquired, 215, 647, 700.

EQUITY.
Jurisdiction of courts of, to review decision of land officers, 15, 29, 42, 55, 97, 112, 142, 153, 159, 169, 173, 212, 469, 550, 635, 640.

ERROR. See *Mistake and Writ of.*
In surveys cannot be corrected after sale of land, 15, 24.

ESTOPPEL.
Title by, 58, 124, 232, 569.
By acquiescing in proceedings, 165.
By taxation, 442.
By selecting lieu land, 459.
Doctrine not applied, 260, 647, 706, 748.

EVIDENCE. PAROLE.
To impeach patent, 87, 447.
When not admissible, 442.
To establish character of swamp land, 430, 438, 447.
As to line of survey, 534.
Not admissible to show that a power of attorney was intended to be a conveyance, 588.

EVIDENCE. CERTIFICATE OF ENTRY.
Of title in State courts, 29, 671, 679.
U. S. courts, 656, 664.
Certified copies of papers on file in land office, 200, 307, 314.
Certified copy of record of patent from county records, 744.
Opinions of land officers, 314.
Certificate as to facts by officers, 609.
Certified copies of selections, 315, 447.
Of the cancellation of an entry not evidence of its illegality, 216, 564.
Rescinding a cancellation evidence of erroneous cancellation, 708.
Of mistake in entry, 728, 736.
name in certificate of entry, 685, 745.
Record of patent, 586.
Recitals in patent, 561.
Memorandum on patent record, 593, 598, 645.
State patent *prima facie* evidence of title, 508.
Of right of pre-emption, 205.

EXECUTORS.
Assignment of land warrant by, 551.

EXPARTE.
Proceedings, binding effect of, 17, 19, 173, 475, 565, 749.

FEE.
In U. S. until patent issues, 670.

FENCE.
Ownership of on public land, 14.

FICTITIOUS NAME.
Entry of land in, 750.

FINAL DECISIONS. See *Land Offices.*

FLOATS.
Sale of, 566–585.

FORCIBLE INTRUSION.
Pre-emption right cannot be obtained by, 1.

FORGERY.
Of application for land warrant, 706.
Of assignment of land warrant, 564.
Of papers upon which a private land claim is confirmed, 769.

FORFEITURE.
Of grant to railroad, 354.

FRACTIONAL SECTIONS.
Survey and sale of, 24.

FRAUD.
In obtaining pre-emption, 112, 130, 171.
land warrant, 706.
assignment of land warrant, 550.
of certificate of entry, 728.
cancellation of an entry, 171.
Upon the U. S., who may raise the question of, 192, 199.
Must be specially set out in bill in equity, 202.
Jurisdiction of courts, in cases of, 152, 171, 728.
Jurisdiction of commissioner in cases of, 170.

FUNCTUS OFFICIO.
Upon issue of patent, 604, 638.

GOOD FAITH.
Under the occupying claimant law, 750.

GRADUATION ACT.
Prohibits contracts for sale of land before entry, 130.

GRANTS. See *Railroads, School Land, State Land, and Swamp Land.*
To fictitious persons, 256.
To deceased persons, 249, 261, 569.
On navigable waters, 508, 529, 531, 534, 535, 550.
In presenti, 162, 346, 355, 369, 389.
In futuro, 328, 335, 373.

GRANTS. LEGISLATIVE.
Construed strictly, 345, 388, 394.
Operate as a transfer of title, 370.
May be repealed, 335.

GUARANTEE.
In sale of land warrant, action upon, 564, 707.

GUARDIAN.
Assignment of land warrant by, 561

HEAD OF A FAMILY.
Under Indian treaties, 275, 284.

HEIRS.
Assignment by, presumptions in favor of their competency, 561.

HOMESTEADS.
Settlers entitled to riparian rights, 219
Vendor's lien before entry not defeated by entry, 10.
Relinquishment of, consideration for a note given, 13.
Entry of timber land, right of settler to cut timber, 217.
Bona fide entry and settlement, 218, 422.
Contracts by settlers to convey, 224.
Mortgage before entry, 10, 230.
Mortgage before final proof, 229, 232.
Mortgage before issue of patent, 236.
Taken in execution for debts contracted prior to issue of patent, 219, 224.
Commuting under 8th section not changed to a pre-emption entry, 224, 240.
Death of settler before final proof, 237, 240.
Taxation of, 703.

HOUSE.
Of pre-emptor on boundary line, 15, 116, 241.

IDEM SONANS, 744.

IMPLIED WARRANTY.
In sale of land warrants, 707.

INCORPORATED CITY.
Lands within limits of, not subject to pre-emption, 193.

INDIAN TREATIES.
Disposal of public land by, 307, 315, 320.
When supreme law, 327.
Conveyance of public land by, 332.
May be repealed by act of Congress, 331.
Caddo Treaty of July 1, 1835; 7 Stat., 472.
Gave a fee simple title to the persons therein named, 314.
Cherokee Treaty of July 8, 1817; 7 Stat., 156.
A lease or sale of the land by the reservee was void, and the act of May 29, 1830, did not give validity to them, 298.
Chickasaw Treaty of October 20, 1832; 7 Stat., 381.
A contract of sale or lease by reservee was void, and such contracts were not validated by the treaty of May 24, 1834, 297.

INDIAN TREATIES—*Continued.*

Chickasaw Treaty of May 24, 1834; 7 Stat., 450.

Land granted to the head of a family for each child, was held by the reservee in trust for the children, 291.

Upon the selection being made, the legal title vested in the reservee, 307.

Chippewa Treaty of September 24, 1819; 7 Stat., 203.

The selection by the reservee gave the legal title to the land selected, 313.

Chippewa Treaty of September 30, 1854; 10 Stat., 1,109.

1. Did not authorize the selection of land outside of the territory ceded by the treaty to the United States.
2. The treaty-making power cannot confer upon the land department any authority in respect to the sale, conveyance, or disposal of the public lands.
3. A patent issued upon a selection of land outside of the ceded territory is void on its face, 320.

Chippewa Treaties of February 22, 1855; 10 Stat., 1,155, and May 7, 1864; 13 Stat., 693.

1. The land in question retained its original character as an Indian reservation, over which the jurisdiction of the State courts did not extend, for civil purposes at least.
2. The estate of the deceased reservee cannot be administered on by the State courts, 208.

Choctaw Treaty of September 27, 1830; 7 Stat., 333

1. The land granted to the head of a family for each child, was held by the reservee in his own right, and not in trust for the children, 284.
2. A white man who had married into the tribe was entitled to land as the head of a family, 284.

Creek Treaty of March 4, 1832; 7 Stat., 366.

1. The twenty sections of land to be selected for the orphan children were not to be taken from the land reserved for the tribe, 275.
2. A grandmother, with whom some of her grandchildren resided, was entitled to land as the head of a family, and her right was not prejudiced by the neglect or refusal of the locating agent to enter her selection, 275.

A married woman, who had been deserted by her husband, was entitled to land as the head of a family, 284.

Kansas Treaty of June 3, 1825; 7 Stat., 244.

A conveyance by the reservee, without the approval of the Secretary of the Interior, was prohibited by the treaty, and void, 291.

Miami Treaty of June 5, 1854; 10 Stat., 1097.

The mode of alienation prescribed by the treaty cannot be changed by the laws of the State, 296.

INDIAN TREATIES—*Continued.*

Miami Treaty of June 5, 1854.

The land is not subject to State taxation while held by the reservee, 703.

Osage Treaty of July 21, 1867; 14 Stat., 687.

The deed of the reservee, when approved by the President relates back and takes effect from date of selection, 297.

Ottawa Treaty of June 24, 1862; 12 Stat., 1237.

A conveyance not approved by the President is void, 297.

Ottawa and Chippewa Treaty of March 28, 1836; 7 Stat., 491.

By the treaty the land in question was withdrawn from general location and pre-emption, 315.

Pottowatomie Treaty of August 29, 1821; 7 Stat., 218.

Upon selection the legal title to the land vested in the reservee, 313.

Pottowatomie Treaty of October 26, 1832; 7 Stat., 394.

A conveyance by a reservee had no effect, until approved by the President; it then took effect from its date, 297.

Pottowatomie Treaty of October 27, 1832; 7 Stat., 399.

1. The treaty gave a title to the reservee which he could legally sell before the selection had been made
2. His death, before the selection, did not defeat the title from vesting in his grantee, upon the selection being made and approved, 567, 579.

Shawnee Treaty of November 2, 1854; 10 Stat., 1056.

Until after the reservees had made their selections, and the surplus of land remaining had been set apart by the President, no right could attach to any part of the land by scrip location or pre-emption, 298.

Sioux Treaty of July 15, 1830; 7 Stat., 330.

The location of scrip issued to reservees, under the act of July 17, 1854, vested the legal title to the land in the reservee, 332.

Winnebago Treaty of August 1, 1829; 7 Stat., 323.

1. The restrictions against alienation, do not extend to the heirs of the reservee.
2. Upon the death of the reservee, the land becomes subject to the payment of his debts, 296.

Wyandotte Treaty of January 31, 1855; 10 Stat., 1159.

The land granted to the head of a family for each child, was held by the reservee in his own right and not in trust for the children, 291.

The land reserved for the orphan children could not be taken in execution and sold, even after the child became of age, and the ratification of such sale by the Secretary of the Interior did not give it validity, 297.

INDIAN TREATIES—*Continued.*
Wyandotte Treaty of January 31, 1855.
The land granted to the competent class became subject to State taxation from the date of sale by the reservee. 703.

INHERITANCE.
Under Oregon donation act, 249, 261.
homestead act, 237.

INJUNCTION.
Courts will not control the action of the land officers by, 154, 722.

INNOCENT PURCHASERS.
When protected, 105, 114, 182, 284, 553, 708.
When not protected, 198, 552, 579, 742.

INTERNAL IMPROVEMENT GRANT. *See State selections.*

IRREGULARITIES.
In obtaining title cured by patent, 552.

ISLANDS.
Ownership of, in lakes, 528.
rivers, 528, 534.

JOINT SETTLEMENT.
By pre-emptors on unsurveyed land, 133.

JURISDICTION.
Term defined, 603.
Of courts to review decisions of land officers, 15, 29, 42, 55, 97, 112, 142, 153, 159, 169, 173, 213, 469, 550, 635, 640.
Of supreme court under 25th section of judiciary act, 112, 142, 469, 671, 715, 718, 720.

LACHES.
Not imputed to one in peaceable possession, 735, 749, 770.

LAKES.
Ownership of soil under, 528.
Rights of riparian owners on, 528, 531, 550.

LAND.
Not subject to entry, 1, 33, 42, 55, 58, 62, 160, 193, 307, 315, 489.

LAND OFFICERS.
Decisions by—See *Jurisdiction.*
upon *ex parte* testimony, 17, 173, 474, 565, 749.
Action of, will not be controlled by mandamus or injunction, 154, 722.
Presumptions in favor of the actions of, 273, 312, 552, 554, 648, 659, 679.

LAND OFFICERS. COMMISSIONER, JURISDICTION OF.
Over decisions of registers and receiver, 139. 151.
surveys of private land claims, 59, 621.
after entry of land, 15.
patents after execution and recording, 594, 608, 638.
decisions of his predecessor, 624.

LAND WARRANTS. See *Bounty Land Warrants.*

LEGAL REPRESENTATIVES.
Who are, under the acts of Congress, 58. 755.

LIMITATIONS. See *Statutes of.*

MANDAMUS.
Courts will not control the action of land officers by, 154, 722.

MARRIED WOMAN.
When the head of a family, 284.

MEANDER LINE OF SURVEY.
When a line of boundary, 531, 534.
When not, 529, 535.

MECHANICS' LIEN.
On improvements on public land, 11.

MEMORANDUM.
On patent record not evidence, 593, 598, 645.

MILITARY BOUNTY LAND WARRANTS. See *Bounty Land Warrants.*

MISTAKE.
Of land officers does not prejudice rights of claimants, 15, 97, 154, 171, 621.
In sale of possessory rights. 13.
In description of land entered, 728, 736.
In name of grantee in certificate of entry. 685.
In name of grantee in patent, 594.
Land warrants issued by, 553.
Patents issued by, 154, 177, 592, 604.
Jurisdiction of courts of equity to correct, 152, 661, 728.

MINERAL CLAIMS.
On school land before survey, 476.

MORTGAGE.
Is not alienation, 232.
By pre-emptor, before filing, 10.
proof and payment, 129.
on day of proof and payment, 129.
By Homestead Settler, before entry, 10. 230.
final proof, 232.
issue of patent, 236.

NAVIGABLE WATERS.
Ownership of soil under, 508, 528.

NEGLIGENCE OF LAND OFFICERS.
Right of claimants not defeated by, 171, 307.

NOTICE See *Bona Fide Purchasers.*
Rehearing without notice to claimants void, 15, 170, 744.
Of final survey of private land claim, where to be published, what to contain, 608.

OCCUPANCY.
By pre-emptor, what constitutes, 204.

OCCUPYING CLAIMANT.
When entitled to pay for improvements, 750, 755.

OFFERED LAND.
Ceases to be, if temporarily withdrawn, 65, 206, 209.

OPINIONS OF LAND OFFICERS.
Not evidence of the law, 314.

OREGON DONATION ACT.
The term "single man" construed to include an unmarried woman, 241.
Contracts by settlers to sell before entry, 249, 261.
House of settler on quarter-section line, 241.
Manual labor on claim performed by servant or friend, 241.
Death of husband or wife before issue of patent, 249, 261.

OSAGE INDIAN LANDS.
Not subject to pre-emption, 41.
Not included in railroad grant, 388.

PAROLE EVIDENCE. See *Evidence.*

PATENTS.
Requisites of execution, 586.
Take effect as a conveyance from date of execution, 598, 608, 633.
Jurisdiction of commissioner to recall, 594, 598, 608.
Jurisdiction of commissioner over the land after issue of, 637.
Presumption in favor of the validity of, 650, 659.
Second patent for same land inoperative, 643.
Reserving the rights of others, 179.
When void in ejectment, 42, 55, 87, 307, 314, 327, 341, 447, 502, 644, 651, 684, 714.
When void on their face, 325, 341.
Takes effect by relation, 40, 166, 296, 482, 573.
Obtained by fraud, 199.
May be valid as to part of the land and void as to part, 314.
Issued by mistake, 154, 594.
Is conclusive against rights subsequently acquired, 94, 553, 606, 638.

PATENTS—*Continued.*
May be attacked by whom, 94, 199, 205.
Recitals in, 576, 579, 713.
Record of as evidence, 588, 593, 608.
Memorandum on record of, not evidence, 593, 620, 645.
State recording laws do not apply to, 744.
Issued after death of patentee, 249, 261, 569.
Bill by U. S. to annul, 174.
Issued by States, *prima facie* evidence of title, 508.

PERSONAL RESIDENCE.
What constitutes, 23, 140.

POSSESSION.
Notice of equitable title, 735.

POSSESSORY RIGHTS.
Of settlers on public land, 1–15, 261.

POWER OF ATTORNEY.
Sale of floats by, 561, 566, 569, 582.
Revoked by death of principal, 568.

PRE-EMPTION.—LANDS NOT SUBJECT TO.
Reserved for military purposes, 29.
Salt springs and salines, 42.
Reserved for the satisfaction of private land claims, 55, 58, 159.
In the possession of a *bona fide* settler, 1.
Within the limits of an incorporated city, 183.
Directed to be sold in a particular manner, 41, 315.
Erroneously certified to a State, 41.
Within an Indian reservation, 306.

PRE-EMPTION.
Abandonment of, what constitutes, 200.
Cannot be initiated by intruding upon the possession of another, 1, 12.
Not prejudiced by refusal of land officers to allow entry, 158, 159.
Cannot be set up where no steps have been taken, 219.
Of settlers on Soscol ranch, in Cal., 1.
Of unoffered lands, 206, 209.
Two declaratory statements on unoffered lands, 142, 158.
Filing not made within three months after settlement, 142, 748.
Filing not made within three months after survey, 495.
Entry of land not included in filing, 171.
Entry confined to quarter-section on which dwelling is situated 95, 97.
Entry obtained by fraud, 19, 112, 130, 170, 171, 183.
Rights acquired by valid entry, 15, 97, 124, 142, 158, 171, 174, 178, 213.

PRE-EMPTION—*Continued.*
No rights acquired by an illegal entry, 15, 29, 174.
Homestead commuted under 8th section is not changed to, 224.
Proof and payment required before public sale, 635.

PRE-EMPTION.—SETTLEMENT.
By an unqualified person, 748.
Priority of, gives priority of right, 103, 166, 212.
Rights acquired by, as against the United States, 73, 159.
others, 97, 159.
And residence required, 117, 190, 200.
Must be reasonable as to time and manner, 205.
On school sections before survey, 87, 469, 493.
Prevented by sickness in family, 204.
Prevented by threats of violence, 204.
Residence on quarter-section line, 15, 116.

PRE-EMPTION.—SETTLERS
Sale of improvements by, 11, 12, 130.
Entitled to peaceable possession, 1, 12.
Contracts by joint, 141, 229.
Agreements to sell before entry, 130, 133, 141.
Sale of land before entry, 129, 130.
Sale of floats, 568.
Sale of land before issue of patent, 124.
Mortgage given by, before entry, 10, 129.
Mortgage given by, on day of entry, 129.

PRE-EMPTION.—DECISIONS OF LAND OFFICERS.
Upon questions of law, 33, 142, 159, 206.
Upon questions of fact, 33, 139, 159, 170, 178.
Conclusiveness of, 17, 33, 114, 139, 142, 158, 178.

PRESCRIPTIVE RIGHTS.
Cannot be acquired against the United States, 769.

PRESENT GRANTS.
Of land for school purposes, 92, 451, 459, 469, 476, 482, 493.
Of land for railroad purposes, 355, 373.
Of swamp and overflowed lands, 435.

PRESUMPTIONS. See *Land Officers.*

PRESIDENT OF THE UNITED STATES.
Authority of, to reserve land from sale, 35.
Cannot revoke the acts of his predecessor, 269.

PRIORITY.
Of right gives priority of title, 166, 306.
Of pre-emption settlement gives priority of right to enter, 212.

PRIVATE ENTRY.
Not permitted on unoffered land, 65.

PRIVATE LAND CLAIMS.
Juridical possession, 58, 772.
The survey of, 59, 608.
Jurisdiction of commissioners over survey of, 608.
Lands within limits of, excluded from settlement, 62.
Upon rejection of, land subject to settlement, 62.
School sections covered by, 492.
Publication of final survey, 608.
Place of publication, 608.
Form of publication, 608.
Evidence of publication, 608.
Conflicting confirmations, 783.
Confirmation, effect of upon the rights of others, 769, 783.
Confirmations obtained upon forged papers, 769.
When subject to taxation, 702.

PROHIBITORY ACTS. See *Alienation*.
Not revived by implication, 566, 576.

PUBLIC LANDS
Term defined, 385.
When offered, and unoffered, 65, 207, 212.

PURCHASERS OF PUBLIC LAND.
Entitled to improvement on the land, 8, 11.
On navigable waters, 531, 547.
Takes title according to the public survey, 16, 24, 531.

QUIT-CLAIM DEED.
By settlers on public land, 10, 14, 249.
By pre-emptor before entry, 130.
By Indian reservee, 296, 297.

RAILROAD GRANTS, from page 335 to 442.

To Burlington and Missouri River Railroad in Nebraska, Act of July 2, 1864; 13 Stat., 356.
1. There are no lateral limits to the grant within which the selection of lieu lands are confined.
2. Selections may be made along the whole line of the road to make up quantity.
3. Selections could not be made of lands on the north side of the road, in lieu of lands deficient on the south side, 434.

To Iowa, by Act of May 15, 1856; 11 Stat., 9.
1. "Swamp lands" having been previously granted to the State, were excepted from the grant, 430.
2. Until the line of the road was definitely fixed upon the ground, the title to any particular section did not vest in the company, 434.
3. Was a grant *in presenti*, vesting the title in the State, immediately upon the location of the line of the road.

RAILROAD GRANTS—*Continued.*

4. One hundred and twenty sections of land were authorized to be sold before any part of the road had been constructed.
5. This land might be selected anywhere on the line of the road, within a continuous length of twenty miles on each side thereof.
6. The conditions imposed by the State upon the road, as to the completion of it, were conditions subsequent, and their non-performance did not defeat the title of the purchaser from the company of the one hundred and twenty sections, 373.

To Kansas, by Act of March 3, 1863; 12 Stat., 772.

Lands within the limits of an Indian reservation at the date of the grant, are excluded from the grant, 388, 413.

To Minnesota, by Act of June 29, 1854; 10 Stat., 302.

The State acquired no title to the lands granted, until the conditions of the grant had been complied with, and before this had been done, Congress could repeal the grant, 335.

To Missouri, by Act of June 10, 1852; 10 Stat., 8.

1. Lands granted to the State as swamp lands were excepted from the grant, 435, 442.
2. The State has power to authorize pre-emption of the land granted, 350.

To Union Pacific Railroad Co., by Acts of July 1, 1862; 12 Stat., 489; and July 2, 1864; 13 Stat., 356.

1. A fraudulent homestead on the land at the time the right of the road attached, did not exclude such land from the grant, 422.
2. The right to land within twenty miles of its road was superior to that of the B. and M. R. R. R. Co., where the grants overlapped, 415.
3. Where the limits of the respective grants to the company and its branches (the Sioux City and Pacific Co.) overlap, the land in the common territory belongs to them jointly, 424.
4. The company is required to pay the costs of surveying the lands granted, 701.

To Western Pacific Railroad Co., by Act of July 1, 1862; 12 Stat., 489.

Lands within the boundaries of a Mexican or Spanish claim, which were *sub judice* at the time the right of the road attached, were excluded from the grant, 383.

To Wisconsin, by Act of June 3, 1856; 11 Stat., 20.

1. Was a grant *in presenti*, and upon the location of the route of the road, the title to the lands vested in the State.
2. The conditions of the grant were subsequent, and no one except the United States can take advantage of their non-performance.
3. The lands have not reverted to the United States, although the road was not constructed within the period prescribed by the grant, 354.

RECITALS.
In patents, 576, 579, 713.

RECORDS.
Of patents as evidence, 588, 593, 608.
Of land office, mode of authentication, 205.

REFUNDING OF PURCHASE MONEY.
Not a bar to action for the land, 19.

REGISTER AND RECEIVER. See *Land Officers*.

REHEARING.
Without notice void, 170.

RELATION.
The doctrine of, as applied to the taking effect of patents, 40, 166, 482, 573, 707, 710, 759.

REMOVAL.
Of improvements on public land after entry, 8, 14.
Of land office, effect upon pre-emption filings, 209.

RES ADJUDICATE, 594, 608, 634, 744.

RESCINDING.
Cancellation of an entry, effect of, 708.

RESIDENCE.
What is a *bona fide*, 190.
By pre-emptor on boundary line, 15, 116, 241.

RESURVEY.
Cannot change boundaries of prior entry, 15.

RESTRICTIONS UPON ALIENATION—See *Alienation*.

RIGHTS.
Of settlers on public lands, 1–15, 58.

RIPARIAN RIGHTS.
Of homestead settlers, 219.
Grants of lands on navigable rivers, 529, 547, 550.
Grants of islands, 535.

RIPARIAN RIGHTS.—OWNERSHIP.
of beds and shores of navigable rivers, 508, 528, 529.
lakes, 528, 550.
of islands in navigable rivers, 528, 529.
of sandbars, 531.
of land between meander line of survey and river, 534, 535.
of accretions, 529, 535.

RULES.
May be prescribed by commissioner, 102.

SALE—See *Alienation.*

SALINE LANDS.
Reserved from sale, 42.

SCHOOL LANDS, page 87, 315, and from page 451 to 508.
To California by act of March 3, 1853; 10 Stat., 244.
Lands upon which a pre emption right existed at the date of survey were excepted from the grant, if the right was perfected within the time required by law, 87.
If the pre-emptor failed to perfect his right, the title to the land vested in the State as of the date of the completion of the survey, 493.
Lands were not excluded from the grant because they contained minerals, or were included within the limits of a private land claim which was finally rejected, 493.
To Indiana by act of April 19, 1816; 3 Stat., 289.
Application of funds arising from sale of school lands, 467.
To Kansas by act of May 30, 1854; 10 Stat., 283.
Operated as a grant to the territory of sections 16 and 36 in each township, and the land could be sold by the territory before its admission into the Union, 492.
To Michigan by act of June 23, 1836; 5 Stat., 59.
1. By the act section 16 in each township was set apart for school purposes.
2. Lands containing minerals were not excepted from the grant.
3. Upon the surveys being made, sections 16 vested in the State.
4. The State could sell the land without the consent of Congress, 459.
To Minnesota by act of March 3, 1849; 9 Stat., 403, and February 26, 1857; 11 Stat., 166.
With the assent of the State, Congress could modify the grant, so as to give a right of pre-emption to settlers upon school sections, made before survey, 469.
To Missouri by act of March 6, 1820; 3 Stat., 545.
The confirmation of a private land claim after the date of the grant, which stood rejected at the date of the act, could not defeat the title of the State, 451.
The State is estopped from claiming section 16, where another section in lieu of it, has been selected and sold, 459.
To Nevada by act of March 21, 1864; 13 Stat., 30.
Lands which were occupied for mining purposes prior to the survey and title afterwards perfected under the mining laws, were excepted from the grant, 476.
By the act of July 4, 1866; 14 Stat., 85.
All mineral land were excepted from the grant to the State, 482.

SCHOOL LANDS—*Continued.*
To Wisconsin by act of August 6, 1846; 9 Stat., 56, and May 29, 1848; 9 Stat., 233.
1. The acts appropriated section 16 in each township to the use of the State.
2. Lands included within an Indian reservation were not excepted from the grant, 482.

SELECTIONS.
By State must conform to the Statute, 318, 508.

SETTLEMENT.
What constitutes, 114, 130, 202.

SETTLERS.
On public land, rights of, 1 to 15.

SINGLE MAN.
The term construed to include an unmarried woman, 241.

SIOUX HALF-BREED SCRIP.
Location of, gives legal title, 332.
Restraint upon alienation of, 582.

SOSCOL RANCH.
Right of settlers to pre-emption, 1.

STATE COURTS.
Ejectment in, 662, 671, 679, 685, 767.

STATE PATENTS.
Prima facie evidence of title, 508.

STATE SELECTIONS.—See *Swamp Lands and School Lands.*
California, confirming act of July 23, 1866; 14 Stat., 218.
Lands were not excluded from confirmation as being "held or claimed under a valid Mexican or Spanish grant," if at the time proof was made under the third section such land had been excluded from the grant, by a survey of the claim by the United States, 496.
Louisiana act of September 4, 1841; 5 Stat., 453.
The selection did not give a legal title, 502.
Michigan act of June 23, 1836; 5 Stat., 59.
1. A selection of a tract of less than 160 acres could not be made.
2. Land appropriated by an Indian treaty could not be selected, 315.
Missouri act of March 6, 1820; 3 Stat., 545.
Was a present grant, and upon selection the State acquired a perfect title, 369.
Missouri act of September 4, 1841; 5 Stat., 453.
Did not authorize the selection of land reserved from sale, 159.

STATUTE OF LIMITATIONS, 758, 768, 770.

SUBSTITUTION.
Of land warrant, a new location, 707.

SUPREME COURT. See *Jurisdiction of.*

SURVEYS.
Cannot be changed after entry, 15.
Purchasers are bound by, 24.
Of public land when considered complete, 24.
Of private land claims, when final, 61, 608.

SWAMP LANDS, from page 430 to 450.
Swamp Land Act of September 28, 1850; 9 Stat., 519.
1. Was a present grant, appropriating the lands of the character mentioned in the act, 430, 435, 443, 450.
2. Such lands were excepted from subsequent grants to railroads, 430, 435.
3. Evidence by which the grant may be established, 430, 435.
4. A sale of the land by the United States, after the date of the act, was void, 314, 447.

Confirming entries and locations of Swamp Land Act of March 2, 1855; 10 Stat., 634.
The act did not give them validity as against a prior purchaser from the State, 450.

Confirming selections of Swamp Land Act of March 3, 1857; 11 Stat., 251.
Confirmed all selections made and filed in the General Land Office prior to the date of the act, which were then vacant, 434, 447.

TAXATION.
Of improvements on public land, 702, 703.
When lands become subject to, 700, 705.
Of land entered under homestead law, 703.
Of land granted to railroads, 699.
Of private land claims, 702.
Of land located with spurious warrant, 705, 708.
Land granted by Indian treaty, 703.
In case of change of entry, 710.
When operates as estoppel, 442.

TERM OF OFFICE.
The word "from" excludes the day of commission, 307.

TERRITORIES.
Title of, to beds of navigable waters, 528.

THREATS OF VIOLENCE.
To pre-emptor, prevention of settlement, 204.

TIMBER.
Right of homestead settler to cut, 217.

TIME.
In which pre-emption proof should be made, 207, 209.

TITLE OF UNITED STATES.
Passes and vests according to laws of U. S., 29, 40, 222.

TITLE.
Acquired by certificate of entry, 725.
assignment of certificate of entry, 728.
Bond for, not defeated by assignment of certificate of entry, 728.
Acquired after sale of land enures to benefit of grantee, 58, 124, 130, 261, 508, 566, 569, 576.

TOWN SITES.
Lands within limits of, not subject to pre-emption, 183.
Rights of settlers upon, before entry, 10, 12.
Contracts by settlers upon, before entry, 13.
Interest of settlers upon, before entry, 274.
Plan of, cannot be changed to the injury of settlers, 275.
Execution of the trust, 275.
Persons entitled under the act, 269, 274.
Policy of the law discussed 183.

TREATY.—See *Indian Treaty.*

TRESPASS.
Upon public land, 217, 219.

UNOFFERED LAND.
When offered land becomes, 65, 206, 209.

U. S. COURTS.
Ejectment in, 332, 656, 663, 664, 759.

U. S. SUPREME COURT.
Jurisdiction over decisions of State courts, 715–722.

UNSURVEYED LAND.
Rights of settlers upon, 11, 14, 73.
Pre-emption settlement upon, 87, 95.

VALLEJO'S REJECTED CLAIM.
Right of pre-emption upon, 1.

VENDOR'S LIEN.
Upon improvements on public land, 10.

VERBAL TESTIMONY.
When admissible to impeach a patent, 87.

VESTED INTEREST,
When acquired in public lands, 15, 53, 81, 86, 105, 153, 167, 171, 369.

VOID CONTRACTS. See *Contracts.*
PATENTS. See *Patents.*
Deeds, 129, 296, 297.
Mortgage, 129.
Entries, 33, 55, 132, 171, 198, 327, 714.

VOIDABLE PATENTS, 94, 199, 664.
WARRANTY.
Implied in sale of land warrants, 707.
Not implied in assignment of certificate of entry, 728.
Operates as estoppel, 124, 232, 569.
WIDOW.
Dower in improvements on public land, 9.
Dower in land sold before entry, 130.
Title to homestead on death of husband, 237, 240.
WOOD.
Cut on public land, ownership of, 9, 14, 217.
WRIT OF ERROR.
To State courts, 715–722.

If sec 8 took the benefit of sec 6 act 53 July also did not sec 7 Junior for a special disqualification as to land excluded from Final Entry. as in case of rejected Grants

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